Supreme Court, U.S.
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No.

In the Supreme Court of the United States

BRYAN E. MCDONNELL,

Petitioner,

v.

CARDIOTHORACIC & VASCULAR SURGICAL ASSOCIATES, INC; GENESIS HEALTHCARE SYSTEM; CARDIOTHORACIC & VASCULAR SURGICAL SPECIALISTS, INC.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a court of appeals can arbitrarily, and without any basis in abstention doctrine or otherwise, refuse to decide a dispositive issue properly raised and briefed on appeal?

2. Whether a district court can decide on summary judgment that, as a matter of law, firms had no intent to violate the Medicare/Medicaid Anti-Kickback Statute (42 U.S.C. §1320a-7b(b)) where there is probative evidence in the record that they intended to evade its prohibition against payments for patient referrals?

PARTIES TO THE PROCEEDING

The parties to the proceeding in the district court and court of appeals were Bryan E. McDonnell, the plaintiff-appellant; Genesis Healthcare System, defendant-appellee; Cardiothoracic & Vascular Surgical Associates, Inc., defendant-appellee; and Cardiothoracic & Vascular Surgical Specialists, Inc., defendant-appellee.

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OPINIONS BELOW

The January 31, 2006 per curiam opinion of the United States Court of Appeals for the Sixth Circuit (App. B at 3a) is unreported. The district court's July 28, 2004 (App. F at 68a), July 30, 2004 (App. E at 38a) and August 3, 2004 (App. D at 9a) summary judgment opinions are also unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 31, 2006. The order of the court of appeals denying rehearing (App. A at 11a) was entered on May 4, 2006. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

The First Amendment to the Constitution provides in relevant part as follows: "Congress shall make no law . . . abridging . . . the right of the people . . . to petition the Government for a redress of grievances."

The Fifth Amendment to the Constitution provides in relevant part as follows: "No person shall . . . be deprived of life, liberty, or property, without due process of law . . .."

Section 1291 of Title 28 of the United States Code provides as follows in relevant part:

> The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . .

Relevant provisions of the Medicare/Medicaid Anti-Kickback Statute, 42 U.S.C. §1320a-7b(b), and the Physician Self-Referral Law ("Stark Law"), 42 U.S.C. §1395nn, are reproduced in Appendix H at 94a-95a and 96a-97a, respectively. Relevant text from the physician recruitment safe harbor regulation of the Department of Health and Human Services for the Anti-Kickback Statute, 42 C.F.R. §1001.952n, is reproduced in the Appendix H at 98a.

Rule 56(c) of the Federal Rules of Civil Procedure provides in relevant part as follows:

> . . . The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. . . .

STATEMENT

The district court had jurisdiction in this case pursuant to the diversity statute, 28 U.S.C. §1332(a).

This case raises issues of fundamental and pervasive importance about expedited decision-making procedures in the federal courts and abuses resulting from those procedures.

1. Without any basis under abstention doctrine or otherwise, the United States Court of Appeals for the Sixth Circuit refused to decide a dispositive and independent claim under Medicare fraud and abuse law prominently raised in petitioner's brief. Affirming the district court in an unpublished opinion which relied solely and explicitly on the district court's analysis -- even though the district court had itself failed to consider the fraud and abuse claim -- the court of appeals simply ignored it. In doing so, it arbitrarily

deprived petitioner of his right of appeal on an issue properly raised in the district court.

2. The district court likewise followed a highly prejudicial short-cut in entering summary judgment for defendants and against petitioner. Even though there was probative evidence in the record that defendants had engaged in a scheme to induce patient referrals in violation of the Anti-Kickback Statute, the district court held, as a matter of law, that defendants had no intent to violate the statute. It did so by accepting their version of events and dismissing contrary evidence as "speculative."

The process by which the district court arrived at summary judgment on the issue of intent -- a matter particularly ill-suited for summary disposition -- directly conflicts with this Court's Rule 56 holdings. A district court has no power to use Rule 56 as an alternative to a trial on the merits, but that is exactly what happened here. The court viewed defendants' Rule 56 motions as an invitation to try the case on the papers, not to decide whether there was a genuine issue for trial.

A. Procedural Background.

Petitioner, Bryan E. McDonnell, was chief of cardiothoracic surgery at the Walter Reed Army Medical Center when he accepted a position with a private practice group and relocated to Ohio. This case raises issues, on the merits, under the Anti-Kickback Statute and Stark Law about the use by hospitals of recruitment agreements in connection with physician relocation.

A central issue in this case is whether Medicare fraud and abuse laws impose a duty on a hospital to disclose to a physician the fact and terms of a recruitment agreement before the physician makes a decision on relocation. McDonnell alleged in Count IV of his Second Amended

Complaint ("Complaint")(App. J at 118a) that respondent Genesis Healthcare System ("Genesis") was under such a duty (Complaint ¶65; App. J at 139a) and that it fraudulently failed to disclose that it would require him to sign a recruitment agreement (*id.* ¶¶70-73; App. J at 141a-42a). Genesis concealed the recruitment agreement until after McDonnell had not only made a decision to relocate to Zanesville, Ohio from Maryland but had actually relocated and begun working at the Genesis hospital in Zanesville. (*Id.* ¶19; App. J at 125a; App. N at 164a-65a).

The recruitment agreement, if signed, would have required McDonnell to remain in Zanesville for at least seven years or pay the hospital, essentially as a penalty, an amount of money tied to his annual salary. (Complaint ¶21; App. J at 125a-26a; App. N at 163a-64a). Before relocating to Ohio, McDonnell had already signed an employment agreement with the practice group providing open-heart surgery services at the hospital, respondent Cardiothoracic & Vascular Surgical Associates, Inc. ("CVSA"), and the recruitment agreement conflicted with and would have supplanted material terms of the employment agreement. (Complaint ¶¶9, 33; App. J at 121a, 130a). McDonnell would not have relocated to Ohio if Genesis had disclosed that it would require him to sign the recruitment agreement. (App. N at 165a). When he refused to sign it, both Genesis and CVSA retaliated, and he was eventually forced out of CVSA. (App. N at 166a).

In response to Genesis' motion for summary judgment in the district court, McDonnell argued that Genesis had a duty under federal law to disclose the recruitment agreement and its terms in advance of any decision on relocation. (App. N at 169a). The district court granted the motion in a July 30, 2004 order (App. E at 38a) but failed to address or consider McDonnell's federal duty claim. In his appeal from the order, McDonnell raised the federal duty claim as the first issue in his brief:

> The District Erred in not Holding that Genesis had a Duty under Federal Law to Disclose to McDonnell, in Advance of his Decision on Whether to Relocate, the Fact and Terms of the Agreement.[1]

The issue was fully briefed by Genesis and McDonnell in the court of appeals. (McDonnell Main Brief at 14-21 (App. N at 168a-75a), Genesis Brief at 27-28 (App. O at 196a), McDonnell Reply Brief at 2-4 (App. P at 199a-201a)). The court of appeals ignored the issue and, instead, affirmed the district court's judgments on the basis of the that court's rulings:

> After reviewing the record, the parties' briefs, and the applicable law, we determine that a panel opinion further addressing the issues raised would serve no jurisprudential purpose. Therefore, *on the grounds identified by the district court*, we affirm the district court's July 28, 2004 denial of summary judgment to McDonnell, its July 31, 2004 grant of summary judgment for CVSA and CVSS, and its August 3, 2004 grant of summary judgment for Genesis.

(App. B at 16a (emphasis added)).[2]

In his petition for rehearing and suggestion for rehearing en banc, McDonnell pointed out that the panel had ignored the federal duty claim (App. Q at 202a, 204a), but the petition was denied by order of May 4, 2006. (App. A at 1a).

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[1] App. N at 168a.

[2] The court of appeals' opinion erroneously states the dates of the district court's summary judgment orders for Genesis and CVSA. The Genesis summary judgment order was entered July 30, 2004 (App. E at 38a) and the CVSA summary judgment order was entered August 3, 2004 (App. D at 9a).

B. The Federal Duty Claim is Independent and Dispositive.

In granting Genesis' motion for summary judgment, the district court held that Genesis had no duty under Ohio law or its own internal policies and procedures to inform McDonnell that it intended to require him to sign a recruitment agreement. (App. E at 44a-51a). Since there was no duty, Genesis' acknowledged failure to disclose the fact and terms of the agreement until months after McDonnell had moved to Ohio provided no basis, in the court's view, for any claim against Genesis for fraud. (App. E at 50a-51a).

The federal duty claim provides an independent ground for McDonnell's fraud claim against Genesis, and it was not mooted or otherwise affected by the district court's ruling that Genesis had no duty of disclosure under state law. The federal duty claim was raised and briefed in the district court (App. N at 169a), but the court ignored it. If the court had considered the claim, it would have concluded that Medicare fraud and abuse laws impose a duty of disclosure independently of state common law, and it would have had to deny, on this ground alone, the motion for summary judgment. If the court of appeals had considered the claim, it would have had to reverse the district court's judgment in favor of Genesis on the fraud claim.

The federal duty claim is simple and straightforward. The Stark Law (42 U.S.C. §1395nn(a)(1)) prohibits a physician from making a referral to a hospital for health services for which Medicare pays if the physician has a financial relationship with the hospital, and the Anti-Kickback Statute (42 U.S.C. §1320a-7b(b)) makes it a felony to knowingly and willfully solicit, receive, offer or pay any remuneration to induce referrals reimbursable by Medicare. (App. N at 169a-75a). Both Genesis and CVSA were aware of these statutory prohibitions against hospital payments to physicians. Under the arrangement between Genesis and CVSA for the open-

heart surgery program, Genesis was obligated to pay CVSA for any losses incurred by CVSA in running the program. (App. N at 163a). Genesis and CVSA had determined well before either had made any contact with McDonnell that Genesis would circumvent the statutory prohibitions by using a physician recruitment agreement to make the payments. (*Id.*).

The Stark Law provides that certain payments by a hospital to a physician are excepted from the prohibition, and one of these is remuneration "to *induce the physician to relocate* to the geographic area served by the hospital in order to be a member of the medical staff of the hospital." (42 U.S.C. §1395nn(e)(5)(emphasis added); App. H at 96a-97a). A regulation under the Anti-Kickback Statute similarly provides that a payment made to induce a physician to relocate is not "remuneration" within the prohibition of the statute:

> As used in section 1128B of the Act [42 U.S.C. §1320a-7b], "remuneration" does not include any payment or exchange of anything of value by an entity in order *to induce a practitioner . . . to relocate, his or her primary place of practice . . .*.

(42 C.F.R. §1001.952(n)(emphasis added); App. H at 98a).

There is no dispute that Genesis drafted the agreement to be signed by McDonnell to bring it within the Stark Law exception and Anti-Kickback Statute safe harbor for physician recruitment agreements (App. N at 163a), and there is no dispute that neither Genesis nor CVSA disclosed the agreement or its terms to McDonnell before he had made a decision to relocate and moved to Ohio. Since they were purporting to take advantage of the Stark Law exception and the Anti-Kickback Statute safe harbor, they had to tell McDonnell about the recruitment agreement and its terms. Otherwise, the remuneration provided in the agreement could

not have *induced* him to relocate. (App. N at 174a-75a). They did not, and the failure to disclose was not only a fraudulent omission of material fact but also evidence that the firms' use of the agreement was a sham.

REASONS FOR GRANTING THE PETITION

I. By Failing to Decide a Dispositive Issue Properly Raised and Briefed, the Court of Appeals Denied McDonnell His Right under 28 U.S.C. §1291 to Appeal from a Final Order of the District Court.

A. Argument.

The court of appeals denied McDonnell's right of appeal under 28 U.S.C. §1291 and barred his access to the court on the federal duty claim. While Section 1291 does not by its terms create a right of appeal,[3] Rule 3(a)(1) of the Rules of Appellate Procedure recognizes that an appeal from a final judgment is "permitted by law *as of right*."[4] There is no suggestion -- nor could there be -- that the federal duty claim was not properly before the court of appeals, and there is no abstention doctrine that would have permitted the court to side-step it. This Court long ago recognized, in considering its own duty to decide an issue properly before it, that

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[3] Section 1291 provides that the "courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . .."

[4] Rule 3(a)(1), FED. R. APP. P (emphasis added). Rule 3(a)(1) provides in pertinent part as follows: "An appeal permitted by law as of right from a district court to a court of appeals may be taken only by filing a notice of appeal with the district clerk within the time allowed by Rule 4. . . ."

> . . . we must decide it, if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. . . . Questions may occur which we would gladly avoid; but we cannot avoid them.[5]

The same duty applies to issues raised in the courts of appeals: "When a Federal court is properly appealed to in a case over which it has by law jurisdiction, it is its duty to take such jurisdiction . . .."[6] There was no ground for refusal by the court of appeals to decide the federal duty claim in this case.

B. Why the Court Should Grant Review in This Case.

The court of appeals' failure to consider the federal duty claim should be reviewed by the Court because it (1) conflicts with decisions of this Court recognizing that the federal courts have a duty to decide the issues before them, (2) deprived McDonnell of the right of appellate review without due process of law in violation of the Fifth Amendment, (3) deprived him of the right of access to the courts in violation of the First Amendment and (4) raises grave issues about procedures in the court of appeals over which this Court has inherent supervisory authority.

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[5] *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821).

[6] *Willcox v. Consolidated Gas Co.*, 212 U.S. 19, 40 (1909), quoted in *England v. Louisiana State Bd. of Medical Examiners*, 375 U.S. 411, 415 (1964). *See also Boston & Maine RR v. Gokey*, 210 U.S. 155, 162 (1908)("it was the duty of the Circuit Court of Appeals to decide the whole case, and its decision of all questions appearing in this record, would be final . . .").

1. The Lower Court's Failure to Decide the Federal Duty Claim Conflicts with Decisions of this Court Recognizing a Duty on the Part of the Federal Courts to Decide the Issues before Them.

While the Court has developed, under the abstention doctrine, rules for how and when the federal courts can properly refrain from deciding issues otherwise before them,[7] they have no application to this case. Here, the court of appeals was facing no federal statutory or constitutional question that could be avoided if a state court were first to decide an unsettled issue of state law.[8] It simply chose not to decide a dispositive issue of federal law that was not mooted by its disposition of any other issues on appeal. Any suggestion that the failure to decide was inadvertent or an oversight is refuted by the fact that the failure was brought directly to the attention of the panel in McDonnell's petition for rehearing. (App. Q at 204a-05a).

There is no question that the lower courts had subject matter jurisdiction over the federal duty claim, and there is no question that the claim was properly before the court of appeals.[9] This Court has repeatedly held that the federal

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[7] *See, e.g., Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 813-19 (1976). *See generally* 17A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4241 (2d ed. 1988).

[8] *Compare, e.g., Fornaris v. Ridge Tool Co.*, 400 U.S. 41, 44 (1970) (abstention warranted where ruling by Supreme Court of Puerto Rico on construction of local statute might make consideration of federal constitutional question unnecessary).

[9] Indeed, the court of appeals considered, and denied, a motion to dismiss the appeal in No. 04-4151 on jurisdictional grounds. (App. G at 91a). The appeal in No. 04-4509, bringing the same

courts have no authority to refrain from exercising jurisdiction over a claim falling within jurisdiction conferred by Congress.[10] They are "bound to proceed to judgment and to afford redress to suitors before them in every case to which their jurisdiction extends."[11] As the Court observed in *United States v. Will*[12] in discussing the Rule of Necessity, the "concept of the absolute duty of judges to hear and decide cases within their jurisdiction . . . is reflected in decisions of this Court."[13]

While the exercise of jurisdiction is mandatory, a federal court nonetheless retains discretion to abstain from deciding certain types of claims. The circumstances under which abstention is appropriate are narrow and stand on principles of federal-state comity.[14] They have absolutely no application here, and there was no suggestion by the court of appeals that it refrained from deciding the federal duty claim on abstention grounds. It just avoided it, pure and simple. This Court has

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underlying judgments to the court of appeals following entry of a formal judgment under Rule 58(a)(1), FED. R. CIV. P., was not challenged on jurisdictional grounds, and the two appeals were consolidated by order of February 7, 2005.

[10] *E.g., New Orleans Public Serv., Inc. v. Council of the City of New Orleans*, 491 U.S. 350, 358 (1989) ("[o]ur cases have long supported the proposition that federal courts lack the authority to abstain from the exercise of jurisdiction that has been conferred").

[11] *Chicot County v. Sherwood*, 148 U.S. 529, 534 (1893), quoted in *id.*

[12] 449 U.S. 200 (1980).

[13] *Id.* at 215.

[14] *See, e.g., Colorado River Water Conservation Dist.*, 424 U.S. at 813-19.

stressed that the federal courts' "obligation to adjudicate claims within their jurisdiction . . . [is] 'virtually unflagging,'"[15] and the court of appeals' refusal to decide the federal duty claim diametrically conflicts with this obligation.

2. The Lower Court's Failure to Decide the Federal Duty Claim Deprived McDonnell of Due Process of Law in Violation of the Fifth Amendment.

This Court has recognized that due process protects an individual's right to "present his case [to a court or other tribunal] and *have its merits fairly judged*,"[16] and the Due Process Clause applies to civil litigants "who seek recourse in the courts . . . to redress grievances."[17] McDonnell's fraud claim against Genesis falls squarely within a property right constitutionally protected under the Due Process Clause. The court of appeals' failure to consider an issue dispositive of that claim -- the federal duty claim -- just as effectively denied McDonnell his right to "have its merits fairly judged" as if he had been stopped at the courthouse door from even bringing the claim.

This Court has also recognized that the government may not arbitrarily destroy an individual's right in a claim without first giving him "an opportunity to present his claim."[18] The process to which an individual is due under the Fifth

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[15] *New Orleans Public Serv., Inc.*, 491 U.S. at 359, quoting Deakins v. Monaghan, 484 U.S. 193, 203 (1988).

[16] *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 433 (1982)(Due Process Clause of Fourteenth Amendment; emphasis added).

[17] *Id.* at 429.

[18] *Id.* at 434.

Amendment must be "implemented in a fair manner,"[19] and it does not include a system or procedure that "deprives persons of their claims in a random manner."[20] That, however, is precisely how McDonnell's federal duty claim was disposed of by the court of appeals. After having been ignored by the district court, it was ignored by the court of appeals even though it was prominently and conspicuously raised as the first issue in McDonnell's brief. There is no suggestion in Section 1291 of Title 28 of the United States Code or in the Rules of Appellate Procedure that the right of appeal from a district court to a court of appeals is discretionary or that the court of appeals can randomly avoid some issues and decide others.

The court of appeals' refusal to decide the federal duty claim is analogous to failure by the Illinois Fair Employment Practices Commission, addressed in *Logan v. Zimmerman Brush Co.*,[21] to consider a wrongful discharge claim. Evaluating the failure under the Fourteenth Amendment, the Court held that the claimant, Logan, was denied due process when the Commission refused to consider his wrongful discharge claim because of its own mistake in not convening a fact-finding conference within 120 days after the claim was filed. Even though the Illinois Supreme Court had deemed the 120-day rule jurisdictional, the Court held that Logan's due process rights were denied because the Illinois procedure randomly deprived persons of their claims.[22] The Court

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[19] *United States v. Salerno*, 481 U.S. 739, 746 (1987).

[20] *Logan*, 455 U.S. at 434 (Due Process Clause of Fourteenth Amendment).

[21] 455 U.S. 422 (1982).

[22] *Id.* at 434.

observed that it was "the system itself," not Logan, that was responsible for loss of his claim:

> . . . [I]t is the state system itself that destroys a complainant's property interest, by operation of law, whenever the Commission fails to convene a timely conference -- whether the Commission's action is taken through negligence, maliciousness, or otherwise.[23]

The analysis applies equally here. The federal duty claim was lost by "the system itself" -- the court of appeals' refusal even to consider it -- not through any action or failure to act by McDonnell. Just as the claimant in *Logan* was deprived of his right without due process of law to present his claim to the state commission, so McDonnell was deprived of his right of appeal on the federal duty claim.

3. The Lower Court's Failure to Decide the Federal Duty Claim Deprived McDonnell of Access to the Courts in Violation of the Petition Clause of the First Amendment.

The right to petition secured by the First Amendment includes the right of access to the courts.[24] This means that an individual has a constitutionally protected right "to seek judicial relief for some wrong."[25] The court of appeals'

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[23] *Id.* at 436.

[24] *E.g., California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972)("[t]he right of access to the courts is indeed but one aspect of the right of petition").

[25] *Christopher v. Harbury*, 536 U.S. 403, 415 (2002)(reason for recognizing a claim asserting denial of access to the courts "is to

refusal to decide the federal duty claim effectively denied McDonnell access to the courts for judicial relief for the wrong caused by Genesis not disclosing its intended use of the recruitment agreement.

While the court of appeals was obviously satisfied that affirming the district court's summary judgment rulings on the basis of the district court's analysis would expeditiously dispose of the appeal, it had a duty to do more than just keep its docket moving. It had a duty to the appellant, McDonnell, to decide dispositive issues raised in the appeal. The federal duty claim presents a matter of purely federal law -- *i.e.*, what is meant by two federal statutory provisions and a regulation issued by a federal agency -- and it was squarely presented for decision in the district court. The district court's failure to decide it was, in turn, squarely presented to the court of appeals. McDonnell was simply shut out of the courts in his attempt to seek relief for the wrong for which this claim sought redress.

It will not do to point to the district court's conclusion, affirmed by the court of appeals, that there was no duty of disclosure under state law. The federal duty claim provides an entirely independent ground for relief and is not affected by disposition of the fraud claim against Genesis on state law grounds. By refusing to decide the claim, the court blocked McDonnell's access to the federal court for a decision on the claim, in violation of his First Amendment right to petition for judicial relief.

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provide some effective vindication for a separate and distinct right to seek judicial relief for some wrong").

4. The Lower Court's Failure to Decide the Federal Duty Claim Raises Grave Issues about Procedures in the Court of Appeals over which this Court has Inherent Supervisory Authority.

This Court has supervisory power over the rules and procedures of the federal courts,[26] and, irrespective of constitutional grounds for reversing the court of appeals' refusal to decide the federal duty claim, the Court should grant review in furtherance of its supervisory authority over the procedures of the courts of appeals.

The court of appeals' opinion shows on its face that the panel did not even consider the federal duty claim even though, McDonnell, in conformity with Rules 28(a)(5) and (9), Fed R. App. P., identified it in his brief as the lead issue for review and then fully argued it.

The claim fell victim to the court's docket-clearing agenda, and the court's use of an unpublished per curiam opinion underscores the short shrift given the appeal. As the Advisory Committee on Appellate Rules has noted, drafting a formal opinion for publication is "much more time consuming than the process of drafting an opinion that serves only to provide the parties with a basic explanation of the reasons for the decision."[27] It has been observed elsewhere

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[26] *E.g.*, *Frazier v. Heebe*, 482 U.S. 641, 645 (1987)(Court has "inherent supervisory power" to ensure that local court rules are consistent with principles of right and justice). *See also* Rule 10(a), SUP. CT. R. (writ of certiorari may be granted to permit "exercise of this Court's supervisory power" over judicial proceedings of a court of appeals). *See generally* Note, *The Supervisory Power of the Federal Courts*, 76 HARV. L. REV. 1656 (1963).

[27] Report of Advisory Committee on Appellate Rules, Committee Note on Proposed App. R. 32.1, at 33 (May 22, 2003).

that unpublished opinions are often drafted entirely by law clerks or staff attorneys, and this method for disposing of appeals reflects the comparative inattention given to those selected for unpublished treatment.[28]

As the public comments on proposed Rule 32.1 of the Rules of Appellate Procedure show, the courts of appeals view unpublished opinions as an indispensable tool for streamlining disposition of appeals.[29] Even those who opposed Rule 32.1 acknowledged, however, that a court has a duty to consider the merits of an appeal,[30] and there was no suggestion that the goal of streamlining the process could trump the right of appeal.

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[28] *See* Letter of January 16, 2004 from Judge Alex Kozinski to (then) Judge Samuel A. Alito, Jr., at 4-11, commenting on proposed Rule 32.1, Fed. R. App. P. The letter is Public Comment 03-AP-169, Proposed Federal Rule of Appellate Procedure 32.1 (rec'd Jan. 20, 2004), available at www.uscourts.gov/rules/2003_Appellate_Rules_Comments_Chart.htm.

[29] The comments can be found at Public Comments, Proposed Federal Rule of Appellate Procedure 32.1, available at www.uscourts.gov/rules/2003_Appellate_Rules_Comments_Chart.htm.

[30] *See, e.g.*, letter of Judge Kozinski, *supra* note 28, at 5 (". . . [G]iven the press of our cases, especially screening cases, we simply do not have the time to shape and edit unpublished dispositions to make them safe as precedent. In other words, we can make sure that a disposition reaches the correct result and adequately explains to the parties why they won or lost, but we don't have the time to consider how the language of the disposition might be construed (or misconstrued) when applied to future cases.").

There can be no serious question about the nature of appellate review to which a litigant is entitled. In Standards Relating to Appellate Courts, the American Bar Association described the threshold requirement for appellate decision-making:

> An appeal is intended to subject a decision of a lower court to collective and deliberative review. An appellate court's internal procedures for deciding an appeal should therefore ensure that the *parties' contentions are carefully considered* by all judges participating in the decision. . . .[31]

In the commentary accompanying this general principle of appellate decision-making, the ABA stressed that the parties should "have confidence that their contentions have been considered."[32]

Judges may spend far less time drafting unpublished opinions than opinions for publication -- because "they know that such opinions function only as explanations to those involved in the cases"[33] -- but achieving economies is no

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[31] 3 AMERICAN BAR ASSOCIATION, STANDARDS OF JUDICIAL ADMINISTRATION: STANDARDS RELATING TO APPELLATE COURTS §3.30 (1994) (emphasis added).

[32] *Id.*, Commentary to §3.30. As one commentator has recently noted, proper appellate review requires that the court "attend to the arguments, factor them into its decisional process, and reject them -- if that is what it ultimately decides to do -- only for legally appropriate reasons." Chad M. Oldfather, *Defining Judicial Inactivism: Models of Adjudication and the Duty to Decide*, 94 GEO. L. J. 121, 181 (2005).

[33] Excerpt from Report of the Committee on Rules of Practice and Procedure to the Judicial Conference of the United States at 11

ground for randomly dispensing with appellate review of some claims altogether. Efficiency-driven dispositions are one thing. Dispositions without deciding an issue properly raised and briefed are another, and the Court should grant review to set a base line for appellate review consistent with fair and just treatment of the rights of the appellant.

II. Summary Judgment under Rule 56 is not an Alternative to a Trial on the Merits, and Whether the Respondent Healthcare Providers Had an Intent to Induce Referrals in Violation of the Medicare/Medicaid Anti-Kickback Statute could not be Decided under Rule 56 Where There was Probative Evidence in the Record that They Engaged in a Scheme to Evade the Statute's Prohibition against Payments for Referrals.

The district court, like the court of appeals, took a procedural short-cut to clear this case off its docket. It used Rule 56 as a proxy for a trial on the merits and disposed of McDonnell's claims based on the Anti-Kickback Statute by simply deciding issues of fact and credibility itself. The court's procedure deprived McDonnell of his right to a trial by jury and constitutes an abuse of Rule 56.

A. McDonnell's Claims and the Evidence.

McDonnell alleges in Count II of the Second Amended Complaint that CVSA and Genesis engaged in a scheme to evade the Anti-Kickback Statute's prohibition against payments by a hospital to induce referrals and the Stark Law's prohibition against payments by a hospital to a physician group which has a financial interest in the hospital.

(Sept. 12, 2005)(discussing proposed Rule 32.1, Fed. R. App. P.), available at www.uscourts.gov/rules/supct1105/Excerpt_STReport_AP.pdf.

(Complaint ¶¶ 39-52; App. J at 132a-35a). The scheme involved getting McDonnell to sign a physician recruitment agreement after he had relocated to Ohio and using the agreement as a device by which to shield from detection otherwise illegal payments by Genesis to CVSA. (*Id.* ¶¶ 41-45; App. J at 132a-33a). When he refused to sign the agreement because it falsely stated that it was a "recruitment" agreement and would have nullified the salary provisions of his employment agreement with CVSA, CVSA engaged in coercive conduct that had the effect of constructively discharging McDonnell from employment. (*Id.* ¶¶ 47-51; App. J at 134a). McDonnell alleges in Count II that the discharge was in violation of public policy embodied in the Anti-Kickback Statute and Stark Law. (*Id.*).

McDonnell alleges in Count V that Genesis tortiously interfered in his employment relationship with CVSA by pressuring him to sign the agreement and that the interference was improper because Genesis knew that the agreement was fraudulent and pretextual under Medicare fraud and abuse laws. (*Id.* ¶ 78; App. J at 143a-44a).

CVSA and Genesis argued in separate motions for summary judgment that the undisputed evidence showed, as a matter of law, that their attempted use of a physician recruitment agreement as a means by which Genesis could make payments to CVSA was entirely proper. They argued that the agreement raised no issues under the Anti-Kickback Statute because there was no evidence of any intent to induce referrals in return for the payments. The district court agreed and granted summary judgment for CVSA and Genesis (App. D at 9a (CVSA); App. E at 38a (Genesis)), which the court of appeals affirmed.

In granting summary judgment, the district court accepted at face value the defendants' version of events and discounted as speculative, or totally ignored, contrary evidence proffered by McDonnell. Focusing solely on the fact that lawyers had

been involved in drafting the agreement, the district court concluded that Genesis and CVSA had proceeded in good faith (App. F at 86a-87a; App. E at 59a; App. D at 29a) and that, *a fortiori*, they had no intent to violate the Anti-Kickback Statute. The court completely ignored, however, an array of record evidence to the contrary.

Even though it was conceded by Genesis and CVSA that payments by Genesis to cover CVSA's operating losses could not be made, consistently with the Anti-Kickback Statute and the Stark Law, in the absence of a signed recruitment agreement (App. N at 163a), the evidence showed that the recruitment agreement was a sham and that Genesis and CVSA had an intention to violate the Statute. First, the agreement played no role in recruiting McDonnell, since it was never disclosed to him until long after he had moved to Ohio. It could not possibly, therefore, have served any "recruitment" function. (App. N at 183a). Second, even though the parties to the agreement were Genesis and McDonnell, the agreement was negotiated entirely between Genesis and CVSA, and they were still quibbling over its terms more than a month after McDonnell had moved to Ohio. (App. N at 184a). Third, even though Genesis concedes that it, Genesis, played no role in recruiting McDonnell, the agreement falsely states that Genesis recruited him and falsely implies that he was induced to relocate by the monetary and other terms of the agreement. (App. I at 99a-100a; App. N at 183a-84a). Fourth, when, nearly a year after McDonnell had moved to Ohio, he continued to refuse to sign the agreement, CVSA's lawyer made it known that McDonnell would be fired unless he signed it. (App. N at 185a). Fifth, when Genesis and CVSA finally abandoned their efforts to coerce McDonnell into signing the agreement, Genesis paid CVSA, without any recruitment agreement, *exactly* the same amount of money that CVSA had been seeking to obtain from Genesis through the device of the recruitment agreement. (App. N at 185a, 190a-92a).

These facts were undisputed and, if believed by a jury, would support an inference that Genesis and CVSA intended to violate the Anti-Kickback Statute's prohibition against making payments to induce referrals and that they collaborated to do so by funneling otherwise illegal payments through a bogus recruitment agreement. A finding of intent would, in turn, permit a jury to conclude that (1) CVSA wrongfully discharged McDonnell in violation of public policy for his refusal to sign the after-the-fact, sham recruitment agreement and (2) Genesis' efforts to pressure McDonnell to sign the recruitment agreement constituted improper interference in his employment relationship with CVSA.

The district court's utter failure to consider this evidence in the record, affirmed by the court of appeals, directly conflicts with controlling decisions by this Court on how evidence is to be evaluated on a motion for summary judgment.

B. Why the Court Should Grant Review in This Case.

In order to rule, as a matter of law, that neither Genesis nor CVSA had an intent to induce referrals in violation of the Anti-Kickback Statute, the district court had to believe the moving parties' version of the facts, ignore evidence in the record to the contrary, draw inferences in favor of the moving parties, refrain from drawing any inferences in favor of the non-movant and decide issues of fact and credibility. The district court used Rule 56 as an alternative to a trial on the merits and essentially tried the case on the motion papers. Its trial-avoidance procedure directly conflicts with controlling decisions by this Court on proper procedures under Rule 56, and it arbitrarily denied McDonnell his right to a trial by jury secured by the Seventh Amendment and Rule 38(a) of the Federal Rules of Civil Procedure.

The procedures for evaluating a Rule 56 motion have been clearly spelled out by this Court. The district court judge is not to weigh the evidence or determine the truth of the matter but is to determine whether there is a genuine issue for trial.[34] The judge's function is to perform a "threshold inquiry of determining whether there is the need for a trial,"[35] and the evidence of the non-moving party is to be believed.[36] The judge must draw all justifiable inferences in favor of the non-moving party.[37] The goal is to ascertain whether the evidence "is so one-sided that one party must prevail as a matter of law" or whether it "presents a sufficient disagreement to require submission to a jury."[38]

Where motive or intent is a subject of a Rule 56 motion, this means that the court must accept the non-moving party's "motivation explanation as true."[39] The court must neither credit the moving party's "asserted inferences over those advanced and supported" by the party opposing the motion

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[34] *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986)("the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial").

[35] *Id.* at 250.

[36] *Id.* at 255 ("evidence of the non-movant is to be believed"). *See also Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451, 456 (1992) (the non-movant's "version of any disputed issue of fact thus is presumed correct").

[37] *Beard v. Banks*, 126 S.Ct. 2572, 2578 (2006) ("we must draw 'all justifiable inferences' in . . . [the non-movant's] 'favor,'" quoting *Liberty Lobby*, 477 U.S. at 255).

[38] *Liberty Lobby*, 477 U.S. at 251-52.

[39] *Hunt v. Cromartie*, 526 U.S. 541, 551 (1999).

nor fail to give the latter "the inference . . . [it is] due."[40] In reversing entry of summary judgment on the issue of racial motivation behind a North Carolina Congressional redistricting plan, the Court stressed in *Hunt v. Cromartie*[41] that "motivation is itself a factual question,"[42] and it held that it was error for the district court to have resolved in favor of the plaintiffs -- the parties moving for summary judgment -- inferences as to the legislature's motivation in drawing voting district boundaries.[43] The district court had evidence before it that would, if believed, have supported an inference that the "General Assembly did no more than create a district of strong partisan Democrats,"[44] and the Court held that summary judgment is inappropriate "when the evidence is susceptible of different interpretations or inferences by the trier of fact."[45] Although the Court was reviewing entry of summary judgment in favor of the party having the burden of proof, there is nothing in the opinion or analysis to suggest that the test for evaluating a Rule 56 motion differs depending on whether it is made by a plaintiff or defendant.

In granting summary judgment for the defendants, the district court ignored *all* of these Rule 56 standards. Instead of determining whether there was a genuine issue of material fact for trial, the court treated the motion papers as the evidentiary record in a bench trial and decided the case on the papers. In order to do so, it resolved issues of fact and

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[40] *Id.* at 552.

[41] 526 U.S. 541 (1999).

[42] *Id.* at 549.

[43] *Id.* at 552-54.

[44] *Id.* at 550.

[45] *Id.* at 553.

credibility that should have been submitted to a jury. This procedure -- treating a Rule 56 motion as an opportunity to decide disputed issues and by-pass a trial on the merits -- may be efficient, but it is forbidden by this Court's holdings.

Under the substantive law applicable to the issue of whether Genesis and CVSA had an intent to violate the Anti-Kickback Statute, it is settled that there is no need to show that the predominant purpose of a transaction was to induce referrals. It is sufficient if only one of a party's purposes is to induce referrals.[46] The district court held that, as a matter of law, there was no "specific intent to disobey the law" because attorneys were involved in drafting the recruitment agreement. (App. F at 86a). The judge thought it significant that McDonnell's attorney -- who was not hired until CVSA's lawyer had threatened that McDonnell would be fired unless he signed the agreement, whose only involvement in the matter was to attempt to determine whether some settlement might be negotiated by which McDonnell would be able to keep his job, and who had *no knowledge* of any of the circumstances relating to counsel for Genesis and CVSA drafting the agreement nearly a year earlier (App. N at 183a) -- testified in deposition that it was his "impression" that counsel for Genesis and CVSA were proceeding in good faith. (App. F at 86a-87a). The judge also thought it probative of good faith and lack of intent that counsel for Genesis had recited in an affidavit that the agreement complied with the Anti-Kickback Statute. (*Id.*).

Whether a defendant properly relied on counsel is itself a fact question, and it has been held that advice of counsel is not a separate and distinct defense under the Anti-Kickback Statute but is rather a circumstance which the factfinder may

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[46] *E.g.*, *United States v. LaHue*, 261 F.3d 993, 1003-04 (10th Cir. 2001), *cert..denied*, 534 U.S. 1083 (2002).

take into account in evaluating specific intent.[47] Here, the district court believed the defendants' evidence and disbelieved or ignored McDonnell's evidence on the issue of intent, drawing all inferences in favor of the parties moving for summary judgment and denying McDonnell any favorable inferences from the evidence in the record. The court of appeals approved this approach by affirming on the basis of the district court's opinions.

This is not a case in which the lower courts' errors have implications only for the parties. Rule 56 was here used to short-circuit a trial on an issue -- intent to violate the Anti-Kickback Statute -- that requires an intensely factual inquiry under any circumstances and as to which there was evidence in the record which, if believed by a jury, would support a finding that at least one of the purposes of the parties was to induce referrals. In the context of this case, entry of summary judgment and its affirmance by the court of appeals on the basis of a facially superficial review not only conflict with this Court's directives for Rule 56 but also evidence subordination of the right to a trial by jury to the lower courts' docket-clearing agendas.

The Court observed in *Celotex Corp. v. Catrett*[48] that Rule 56 should be construed with due regard not only for the rights of parties asserting claims but also for the rights of parties

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[47] *United States v. Weinbaum*, No. 03-CR-1587-L, slip op. at 19 (S.D. Cal. March 9, 2005) ("Advice of counsel is not regarded as a separate and distinct defense [to a charge that defendant violated the Anti-Kickback Statute] but rather as a circumstance indicating good faith which the trier of fact is entitled to consider on the issue of specific intent.") (App. R at 238a-39a).

[48] 477 U.S. 317 (1986).

opposing claims to demonstrate that they have no basis.[49] Where, as here, however, the level playing field contemplated by the Court in *Celotex* is tilted -- in favor of parties opposing claims -- for the sole purpose of achieving docket efficiencies, Rule 56 is misused just as surely as if a court were arbitrarily to deny a Rule 56 motion by a party opposing a claim. Rule 56 is not a proxy for, or time-saving alternative to, a trial on the merits. The Court should grant review in order to provide the lower courts with direction on the proper balance between just and fair management of their dockets and the proper application of Rule 56.

CONCLUSION

The petition for a writ of certiorari should be granted.

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[49] *Id.* at 327 ("Rule 56 must be construed with due regard not only for the rights of persons asserting claims and defenses that are adequately based in fact to have those claims and defenses tried to a jury, but also for the rights of persons opposing such claims and defenses to demonstrate in the manner provided by the Rule, prior to trial, that the claims and defenses have no factual basis.").

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Nos. 04-4151/4509

[Filed May 4, 2006]

BRYAN E. MCDONNELL, Plaintiff-Appellant,	)
v.	)
CARDIOTHORACIC & VASCULAR SURGICAL ASSOCIATES, INC., ET AL., Defendants-Appellees.	)

Before: GUY and GIBBONS, Circuit Judges; and EDMUNDS, District Judge.*

ORDER

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote

* Hon. Nancy G. Edmunds, United States District Judge for the Eastern District of Michigan, sitting by designation.

on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the cases. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/_____
Leonard Green, Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Nos. 04-4151/4509

[Filed January 31, 2006]

BRYAN E. MCDONNELL,
Plaintiff-Appellant,

v.

CARDIOTHORACIC & VASCULAR SURGICAL ASSOCIATES, INC.; GENESIS HEALTHCARE SYSTEM; CARDIOTHORACIC & VASCULAR SURGICAL SPECIALISTS, INC.,
Defendant-Appellee.

ON APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
Case No. 2:03-cv-79
Judge Gregory L. Frost

Before: GUY and GIBBONS, Circuit Judges; and EDMUNDS, District Judge.*

OPINION

PER CURIAM. Plaintiff-appellant Dr. Bryan E. McDonnell sued Cardiothoracic & Vascular Surgical Associates, Inc. ("CVSA") and its successor Cardiothoracic & Vascular Surgical Specialists, Inc. ("CVSS") under Ohio law, alleging fraud, wrongful discharge in violation of public policy, and breach of an employment agreement in connection with McDonnell's recruitment and employment by CVSA to be the cardiothoracic surgeon at a Zanesville, Ohio hospital owned and operated by Genesis Healthcare System ("Genesis"). McDonnell also sued Genesis under Ohio law for fraud and tortious interference with McDonnell's contractual relationship with CVSA.

The district court denied McDonnell's partial motion for summary judgment on July 28, 2004, granted CVSA's and CVSS's joint motion for summary judgment in part on July 30, 2004, and granted Genesis's motion for summary judgment in part on August 3, 2004. The parties later stipulated to dismissal of the claims not disposed of by summary judgment. McDonnell now appeals the district court's grant of summary judgment as to the remaining claims.

We review the district court's order granting summary judgment de novo. *NILAC Int'l Mktg. Group v. Ameritech Svcs., Inc.*, 362 F.3d 354, 357 (6th Cir. 2004). Summary

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* The Honorable Nancy G. Edmunds, United States District Judge for the Eastern District of Michigan, sitting by designation.

judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). A "material" fact is one "that might affect the outcome of the suit." *Anderson v. Liberty Lobby,* 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). We must view the evidence and draw all reasonable inferences in favor of the non-moving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986).

McDonnell first alleges that both CVSA and Genesis withheld material information regarding the nature of his employment at the time when he signed his employment contract, thereby fraudulently inducing him to sign an employment contract with CVSA. The district court held that McDonnell failed to produce material evidence showing that CVSA or Genesis intended to deceive McDonnell when they neglected to inform him before he accepted CVSA's job offer that a Physician Recruiting Agreement ("PRA") would be required as a condition of his employment. In addition, it found that Genesis lacked any duty to disclose such information.

Second, McDonnell alleges that CVSA wrongfully (constructively) terminated him for his later refusal to sign several agreements with CVSA and Genesis, including a PRA and promissory note. According to McDonnell, these agreements violated the Physician Self-Referral Law ("Stark Law"), 42 U.S.C. § 1395nn, the Medicare/Medicaid Anti-Kickback Law ("Anti-Kickback Law"), 42 U.S.C. § 1320a-7b(b), and Ohio common law. McDonnell alleges that he was constructively terminated as a result of his refusal to sign

these purportedly illegal agreements, thereby making his constructive termination wrongful as against public policy. In addition, he alleges that his purported constructive termination by CVSA violated the terms of his employment contract. The district court determined that the PRA was legal under the Stark and Anti-Kickback laws, and that as a result, no clear public policy against CVSA's actions existed under Ohio law, and McDonnell's claim therefore failed as a matter of law. Similarly, the court noted that even if CVSA constructively terminated McDonnell, that termination did not violate the clear terms of the employment contract as a matter of law.

Finally, McDonnell claims that Genesis, by refusing to remit payment to CVSA according to an Exclusive Services Agreement between CVSA and Genesis without a signed PRA, tortiously interfered with McDonnell's contractual relationship with CVSA. The district court held that it would have been illegal under the Stark and Anti-Kickback Laws for Genesis to pay CVSA without the PRA. McDonnell presented "nothing but speculation" to counteract the evidence showing that Genesis refused to pay CVSA in order to avoid this illegality. As a result, McDonnell presented no genuine issue of material fact on this issue, and the district court granted summary judgment for Genesis on this issue.

After reviewing the record, the parties' briefs, and the applicable law, we determine that a panel opinion further addressing the issues raised would serve no jurisprudential purpose. Therefore, on the grounds identified by the district court, we affirm the district court's July 28, 2004 denial of summary judgment to McDonnell, its July 31, 2004 grant of summary judgment for CVSA and CVSS, and its August 3, 2004 grant of summary judgment for Genesis.

AFFIRMED.

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO

Case No. 2:03-cv-79

[Filed November 17, 2004]

Bryan E. McDonnell	)
	)
v.	)
	)
Cardiothoracic & Vascular Surgical Associates, Inc., et al.	)
	)

Judge Frost
Magistrate Judge Kemp

JUDGMENT IN A CIVIL CASE

[X] **Decision by Court**. This action was decided by the Court without a trial or hearing.

IT IS ORDERED AND ADJUDGED that:

1. The Court's July 28, 2004 Opinion & Order (Doc. # 162) denied Plaintiff Bryan E. McDonnell's Motion for Partial Summary Judgment.

2. Pursuant to the Court's July 30, 2004 Opinion & Order (Doc. # 164) that granted in part and denied in part Defendant Genesis Healthcare's Motion for Summary Judgment, judgment is hereby entered in favor of Defendant Genesis Healthcare and against Plaintiff Bryan McDonnell only as to the claims the Order granted summary judgment.

3. Pursuant to the Court's August 3, 2004 Opinion & Order (Doc. # 165) that granted in part and denied in part the Motion for Summary Judgment filed by Defendant Cardiothoracic & Vascular Surgical Associates, Inc. and Defendant Cardiothoracic & Vascular Surgical Specialists, Inc., judgment is hereby entered in favor of Defendant Cardiothoracic & Vascular Surgical Associates, Inc. and Defendant Cardiothoracic & Vascular Surgical Specialists, Inc. only as to the claims the Order granted summary judgment.

4. Pursuant to Plaintiff Bryan McDonnell's Notice of Stipulation of Dismissal of Remaining Claims Against Defendants Genesis Healthcare, Cardiothoracic & Vascular Surgical Associates, Inc., and Cardiothoracic & Vascular Surgical Specialists, Inc. without Prejudice (Doc. # 171), all remaining claims and parties were dismissed.

Date: November 17, 2004 **James Bonini, Clerk**

/s/ Scott Miller

By Scott Miller/Deputy Clerk

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. C2-03-0079

[Filed August 3, 2004]

BRYAN E. McDONNELL, Plaintiff,	)
v.	)
CARDIOTHORACIC & VASCULAR SURGICAL ASSOCIATES, INC., et al., Defendants.	)

GREGORY L. FROST,
UNITED STATES DISTRICT JUDGE
Magistrate Judge Kemp

OPINION AND ORDER

This matter is before the Court on Defendant Cardiothoracic & Vascular Surgical Associates, Inc.'s ("CVSA") and Defendant Cardiothoracic & Vascular Surgical Specialists, Inc.'s ("CVSS") Motion for Summary Judgment (Doc. # 109); Plaintiff Bryan McDonnell's ("McDonnell")

Memorandum in Opposition (Doc. # 129), and the Reply Memorandum of CVSA and CVSS (Doc. # 139). For the following reasons, the Court **GRANTS** the motion of CVSA and CVSS in part and **DENIES** it in part.

BACKGROUND

McDonnell is a board-certified general and cardiothoracic surgeon. (Pl.'s Second Am. Compl. ¶ 1). Genesis is an Ohio nonprofit corporation engaged in providing health care services. *Id.* at ¶ 2. It owns and operates the Zanesville Hospital and Bethesda Hospital in Zanesville. *Id.* CVSA is a professional corporation that provides cardiothoracic and vascular surgical services at Ohio hospitals. *Id.* at ¶ 3. CVSS took over CVSA's business in January 2003. *Id.* at ¶ 5. As such, CVSS is the successor in interest to CVSA.[1] *Id.*

Genesis wanted to establish an open-heart surgery program at the Zanesville Hospital and contacted CVSA to discuss the possibility of CVSA becoming the exclusive provider of open-heart surgery services at that facility. CVSA was interested, but did not want to incur any financial losses. As such, Genesis and CVSA discussed the possibility of Genesis financially supporting CVSA by compensating CVSA for its operating expenses at the Zanesville location in order to prevent any loss. However, in order for the support to be legal under federal health care statutes, Genesis and CVSA agreed that a Physician's Recruitment Agreement ("PRA") would be needed. (Pl.'s Mem. in Supp. 6). Genesis' attorney drafted a preliminary PRA and forwarded it to CVSA's attorney in March 2000. *Id.* at 7. The parties to the PRA would be Genesis and the selected physician. *Id.*

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[1] The Court will use CVSA to refer to CVSA and CVSS.

Subsequently, Genesis signed an Exclusive Services Agreement for Cardiothoracic Surgery Program ("ESA") with CVSA in August 2000. (Pl.'s Second Am. Compl. ¶ 12). Pursuant to that agreement, Genesis agreed that CVSA would be the exclusive provider of certain surgical procedures at the Zanesville Hospital, including open-heart surgery. (ESA at 1.1). Accordingly, CVSA agreed to provide a full-time cardiothoracic surgeon in order to establish an open heart surgery program at the Zanesville Hospital. *Id.* at 1.2. However, the surgeon was to be an employee of CVSA, and nothing in the ESA "shall be construed to create between Genesis and CVSA or Genesis and any employees or agents of CVSA an employer-employee relationship...." *Id.* at 11. Additionally, CVSA agreed to provide coverage for the selected physician when the doctor was on vacation or otherwise unavailable. *Id.* at 1.2. In return, Genesis agreed to hire and pay necessary support personnel and obtain required equipment. *Id* at 5.1, 5.2. CVSA agreed to bill patients directly for services rendered, while Genesis would separately bill the patients for facility charges. *Id.* at 7.1. McDonnell was not a party to this agreement. (Pl.'s Second Am. Compl. ¶ 12).

McDonnell visited Genesis as a candidate for the physician position in May 2000. (Pl.'s Mem. in Supp. 7). Genesis did not tell McDonnell about the PRA during his visit. *Id.* at 7.

McDonnell signed an Employment Agreement ("Employment Agreement") with CVSA on September 19, 2000. (Pl.'s Am. Compl. ¶ 9). At the time McDonnell signed the Employment Agreement, he was not aware of the ESA. *Id.* at ¶ 12. The Employment Agreement had a term of three years and provided that either party could terminate the Employment Agreement at any time with or without cause

with notice. (Employment Agreement at ¶ 6). Additionally, the agreement permitted McDonnell to take four weeks paid vacation during his first year, and six weeks during his second and third years. *Id.* at ¶ 8. The Employment Agreement also stated that McDonnell would have the right to purchase CVSA stock if "the employment relationship proves to be mutually satisfactory at the end of the initial 36 month term of this agreement." *Id.* at ¶ 13. Finally, the agreement stated that "This document contains the entire agreement between the parties and supersedes any prior understandings or agreements between them and the subject matter." *Id.* at ¶ 17.

McDonnell and his family subsequently relocated from Maryland to Zanesville and performed his first operation in late October 2000. (Pl.'s Second Am. Compl. at ¶ 11). In early February 2001, Genesis and CVSA delivered the PRA to Dr. McDonnell for signature. *Id.* at ¶ 19. The PRA was prepared by either CVSA, Genesis, or both parties together. *Id.* The PRA contained ancillary agreements, including a Security Agreement; a Consent to Assignment; an Agreement of Assignment (collectively the "Ancillary Agreements"); and a Cognovit Promissory Note. *Id.* The parties to the proposed PRA were Genesis and McDonnell. *Id.* at ¶ 20.

Among other things, the PRA, by its name, purported to "recruit" McDonnell to provide cardiothoracic surgery services at the Zanesville Hospital and a guarantee that Genesis would provide him a minimum annual compensation for a 3-year period. (Pl.'s Second Am. Compl. ¶ 20.) The Cognovit Note, in the amount of $960,000.00, would have required McDonnell to repay all or a portion of the annual compensation payments provided for in the PRA if he were to leave the Zanesville area before the expiration of seven years. *Id.* at ¶ 21. The Consent to Assignment Agreement, which Genesis, Dr. McDonnell, and CVSA were all to be parties to,

permitted Genesis to pay directly to CVSA the payments that it would otherwise be making to Dr. McDonnell under the PRA. *Id.* The Security Agreement, entered into by CVSA and Genesis, gave Genesis the right to collect, among other things, CVSA's and Dr. McDonnell's accounts receivable. *Id.*

McDonnell declined to sign the PRA, Cognovit Promissory Note, and Ancillary Agreements. *Id.* at ¶ 22. CVSA and Genesis then demanded that McDonnell sign the documents. *Id.* at ¶ 27. When McDonnell refused, Genesis, CVSA and McDonnell attempted to reach a satisfactory agreement but were unable to do so. McDonnell then submitted a resignation letter on January 8, 2002. *Id.* at ¶ 58.

Thereafter, McDonnell filed this suit alleging that CVSA: (1) committed fraud; (2) wrongfully (constructively) discharged McDonnell in violation of public policy, and (3) breached the Employment Agreement. McDonnell also asserted that Genesis had committed fraud and had tortiously interfered with McDonnell's employment relationship with CVSA.

CVSA's Motion for Summary Judgment and McDonnell's response in opposition are now before the Court.

STANDARD OF REVIEW

The procedure for considering whether summary judgment is appropriate is set forth in Federal Rule of Civil Procedure 56(c), which provides:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is not genuine issue as to any material

> fact and that the moving party is entitled to judgment as a matter of law. The evidence must be viewed in the light most favorable to the nonmoving party.

Adickes v. Kress & Co., 398 U.S. 144, 158-159, 90 S. Ct. 1598, 26 L. Ed. 2d 142 (1970). Summary judgment will not lie if the dispute about material fact is genuine; "that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). Summary Judgment is appropriate however, if the opposing party fails to make a showing sufficient to establish the existence of an element essential to that party's case and on which that party will bear the burden of proof trial. *Celotex Corp. v. Catrett,* 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986); *see also Matsushita Electronic Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986).

Additionally, in responding to a summary judgment motion, the nonmoving party "cannot rely on the hope that the trier of fact will disbelieve the movant's denial of a disputed fact, but must 'present affirmative evidence in order to defeat a properly supported motion for summary judgment'" *Id.* (quoting *Liberty Lobby,* 477 U.S. at 257). The non moving party must adduce more than a mere scintilla of evidence in order to overcome the summary judgment motion. *Id.* It is not sufficient for the nonmoving party to merely "'show that there is some metaphysical doubt as to the material facts.'" *Id.* (quoting *Matsushita,* 475 U.S. at 586). Moreover, "the trial court no longer has the duty to search the entire record to establish that it is bereft of a genuine issue of material fact." *Id.* That is, the nonmoving party has an affirmative duty to direct the court's attention to those specific

portions of the record upon which it seeks to rely to create a genuine issue of material fact.

DISCUSSION

I. FRAUD

McDonnell's first claim against CVSA is for fraud. Specifically, McDonnell alleges that CVSA fraudulently failed to disclose the PRA and that the termination of the ESA would result in McDonnell losing staff privileges at Genesis without due process. (Pl.'s Second Am. Compl. ¶¶ 32, 33). McDonnell also asserts that CVSA fraudulently misrepresented that McDonnell would have reasonable time off and that CVSA would consider him for stockholder status at the end of the Employment Agreement. *Id.* at ¶¶ 29, 30, 31. CVSA argues that it is entitled to summary judgment because: (1) Genesis and CVSA failed to provide the PRA to McDonnell prior to his relocation because of a miscommunication, not because of any fraudulent intent; (2) CVSA did not have a duty to disclose the ESA's terms to McDonnell, who was a non-party to the ESA and an at-will employee; (3) any alleged representation regarding reasonable time off was too vague to be enforceable, and (4) the record does not support McDonnell's stock option arguments. (CVSA Mem. in Supp. 16-24).

To sustain a claim for fraud pursuant to Ohio law, a plaintiff must establish: (1) a representation or, where there is a duty to disclose, concealment of a fact; (2) which is material to the transaction at hand; (3) made falsely, with knowledge of its falsity, or with such utter disregard and recklessness as to whether it is true or false that knowledge may be inferred; (4) with the intent of misleading another into relying upon it; (5) justifiable reliance upon the representation

or concealment, and (6) a resulting injury proximately caused by the reliance. *See Russ v. TRW, Inc.*, 59 Ohio St. 3d 42, 570 N.E.2d 1076, 1084 (1991). Where a fraud claim is based solely upon an alleged concealment, or failure to speak, rather than an affirmative misrepresentation, such silence is only actionable for fraud where the law imposes a duty a speak. *See Schulman v. Wolske & Blue Co., L.P.A.*, 125 Ohio App.3d 365, 372, 708 N.E.2d 753 (1998); *see also Kratzer v. O'Brien,* 1994 Ohio App. LEXIS 5247, 1994 WL 667962, *2 (Ohio App. 5 Dist. Oct. 31, 1994).

A. CVSA'S ALLEGED FRAUDULENT OMISSIONS

McDonnell first alleges that CVSA failed to advise him of material information regarding Genesis' and/or CVSA's intention to use the PRA.[2] (Pl.'s Second Am. Compl. ¶ 33; *see also* Pl.'s Mem. in Opp'n 2-5). Such information, McDonnell argues, would have influenced his decision on whether to relocate to Zanesville. CVSA responds that it lacked the requisite intent because a simple miscommunication prevented CVSA and Genesis from disclosing the PRA to McDonnell. (CVSA Mem. in Supp. 22-23; Reply Mem. 2-3). Because McDonnell asserts a claim for fraud against CVSA based upon a failure to disclose information, the Court must first determine whether Genesis had a duty to disclose that information.

A duty to speak arises when one party has information that the other party is entitled to know because of a fiduciary or other similar relationship of trust between them. *See Ed*

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[2] The Court previously held that Genesis lacked fraudulent intent in failing to disclose the PRA. (July 30, 2004 Opinion & Order 10-12).

Schory & Sons, Inc. v. Francis, 662 N.E.2d 1074, 1081, 75 Ohio St. 3d 433, 1996 Ohio 194 (1996). This is referred to as a fiduciary relationship. A duty to disclose may also arise out of "an informal relationship where both parties to a transaction understand a special trust or confidence has been reposed." *Blon v. Bank One, Akron, N.A.*, 39 Ohio St. 3d 98, 519 N.E.2d 363, 367 (1988). This is known as a de facto fiduciary relationship. Thus, in this situation, a duty to disclose would arise if and when a fiduciary relationship existed between CVSA and McDonnell, or if a de facto fiduciary relationship existed between the two.

Neither party addressed the issue of duty. The Court holds, however, that CVSA, as McDonnell's employer, undoubtedly had a relationship of trust and confidence with McDonnell. CVSA trusted McDonnell's abilities to perform his duties in a competent manner, and its decision to hire McDonnell evinces the fact that CVSA had confidence in McDonnell's abilities. Likewise, McDonnell placed trust and confidence in CVSA to be a good employer by accepting CVSA's offer of employment. Thus, the Court holds that a fiduciary relationship existed between the two. Further, the PRA was material to McDonnell's decision to accept employment with CVSA because under the PRA, McDonnell would have had to stay in Zanesville for seven years. This is in contrast to the Employment Agreement, which was to last for three years.

The issue thus becomes whether CVSA intentionally failed to disclose the PRA to McDonnell prior to his relocation. The Court holds that CVSA did not. Rather, as the Court's July 30, 2004 Opinion & Order states, a miscommunication between Genesis and CVSA prevented McDonnell from receiving the PRA. (July 30, 2004 Opinion & Order 10-12). As such, the Court holds that CVSA lacked the requisite

intent. There being no genuine issues of material fact, CVSA is entitled to judgment as a matter of law on McDonnell's PRA fraud claim.

McDonnell next argues that CVSA fraudulently failed to disclose that if the ESA was terminated, he would lose all clinical privileges at Zanesville "without any due process recourse under the medical staff bylaws." (Pl's Second Am. Compl. ¶ 32; *see also* Pl.'s Mem. in Opp'n 6). The ESA was an agreement between Genesis and CVSA. CVSA responds that it did not have a duty to disclose the ESA's terms to McDonnell, and that the Employment Agreement provided that McDonnell, as an at-will employee, could be terminated at any time. (CVSA Mem. in Supp. 3; Reply Mem. 24). As such, CVSA contends that summary judgment is proper.

Again, the first step is determining whether CVSA had a duty to disclose the ESA's terms to McDonnell. The Court held above that CVSA and McDonnell shared a fiduciary relationship. A duty to disclose therefore existed. The next inquiry is whether the information in the ESA was material to McDonnell's decision to accept CVSA's employment agreement. That agreement stated, in pertinent part:

> In the event this Agreement is terminated, then all clinical privileges granted to Physician pursuant to this Agreement shall also automatically terminate. . . . Termination of clinical privileges pursuant to this Section is governed solely by this Agreement. Termination of clinical privileges pursuant to this Section does not give rise to any due process rights as set forth in the Medical Staff bylaws. *CVSA represents that the Physician who provides services pursuant to this Agreement is aware of and accepts the limitations set forth in this Section.* . . .

(ESA ¶ 9.4) (emphasis added).[3]

Thus, McDonnell asserts that because CVSA affirmatively represented to Genesis that McDonnell (as the hired physician) knew about the ESA's due process provision, CVSA had a duty to disclose that information to McDonnell. The Court disagrees. CVSA made that representation to Genesis, not to McDonnell. Consequently, Genesis, not McDonnell, would have a cause of action against CVSA for fraudulent misrepresentation.

This conclusion is not fatal to McDonnell's claim, however. The Court held above that CVSA and McDonnell shared a fiduciary relationship through their status as employer/employee.

Further, McDonnell testified that the due process provision would have been material to his decision to accept CVSA's offer. Specifically, McDonnell assumed "at all times prior to accepting employment that if he were to become a member of the Zanesville Hospital Medical Staff in connection with accepting employment from CVSA, he would have the benefit of the same rights and privileges as other medical staff." (Pl.'s Mem. in Opp'n 7). Those privileges included due process rights.

The Court concurs that such information would have been material because it materially affected the terms and conditions of McDonnell's employment. Consequently, the Court holds that the duty to disclose the ESA's due process

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[3] CVSA executed the ESA with Genesis in August 2000 and hired McDonnell in September 2000. (Pl's Second Am. Compl. ¶¶ 9, 12).

provision arose not from CVSA's representations to Genesis in the ESA, but rather from CVSA's status as McDonnell's employer and from CVSA's corresponding fiduciary relationship with McDonnell.

CVSA responds by citing *Gouge v. BAX Global, Inc.*, 252 F. Supp. 2d 509 (N.D. OH 2003) for the proposition that it did not have a duty to disclose the ESA's due process provision. In that case, the Court noted:

> Moreover, according to one author, as of 1997 no court had found that, as a matter of law, an employer has an affirmative duty to reveal facts about its financial status or business dealings to at-will employees. . . . Employees asserting fraudulent concealment generally only win when the employers give them false or misleading impressions, thereby creating a duty to disclose and correct those impressions.

Id. at 517. The Court finds *Gouge's* logic unpersuasive here for two reasons. First, there was no indication in *Gouge* that the agreement at issue was material to the employee's job as the ESA is here. Second, nothing in the *Gouge* agreement specifically stated that the employer promised to tell the employee about a provision in the agreement. As such, the Court declines to hold that CVSA did not have a duty to disclose the ESA's due process provisions under *Gouge*.

The Court now turns to the issue of intent. That is, by failing to disclose the ESA's due process provision, did CVSA intend to mislead McDonnell about the terms and conditions of his employment? Neither party briefed this issue, and the record is silent on intent as well. Because of this, the Court is unable to determine whether genuine issues

of material fact exist. In situations such as this, intent is an issue of fact best left to a jury. *See* 8 *Charles A. Wright, Arthur R. Miller & Richard Marcus, Federal Practice and Procedure* § 2730 at 7 (2nd ed. 1994). Therefore, the Court denies CVSA's motion for summary judgment on McDonnell's claim for fraudulent omission regarding the ESA's due process provision.

B. CVSA'S ALLEGED FRAUDULENT MISREPRESENTATIONS

McDonnell first asserts that CVSA fraudulently misrepresented that McDonnell would have reasonable time off. (Pl's Second Am. Compl. ¶¶ 29, 30, 31). CVSA counters that McDonnell's own admissions thwart his claim. (CVSA Mem. in Supp. 18; CVSA Reply 4).

McDonnell's argument is totally without foundation, and, indeed, the Court is troubled that McDonnell even asserted it. McDonnell testified in his deposition that Dr. Charles Bush ("Bush"), CVSA's director, told him during the May 2000 visit that McDonnell would have four weeks paid leave the first year. (McDonnell Dep. 280-281). McDonnell also testified during his deposition that Dr. Bill Watson ("Watson"), another CVSA director, represented during the interview process that McDonnell would get reasonable time off. *Id.* at 517. Consistent with those statements, the Employment Agreement provided that McDonnell would get four weeks of paid vacation during his first year. (Employment Agreement ¶ 8). McDonnell stated in his affidavit that the Employment Agreement was consistent with Bush's promises for reasonable time off. (McDonnell Aff. ¶ 4). McDonnell admitted that he got four weeks off during his first year. (McDonnell Dep. 243-44; McDonnell Aff. ¶ 7). Thus, McDonnell received reasonable time off and

CVSA did not make a fraudulent statement. There are no genuine issues of material fact and CVSA is entitled to judgment as a matter of law on McDonnell's reasonable time off fraudulent misrepresentation claim.

McDonnell's last argument regarding his fraud claim is that CVSA fraudulently misrepresented to him during his May 2000 visit and in the Employment Agreement that he would be considered for stockholder status at the end of the Employment Agreement because CVSA had no intention of honoring it at the time the statements were made and when the Employment Agreement was entered into. (Pl's Second Am. Compl. ¶¶ 29, 31). CVSA asserts that McDonnell's claim is meritless for two reasons. First, the CVSA's statements to McDonnell about the stock options were not false at the time they were made, nor was the corresponding provision in the Employment Agreement false. Second, McDonnell could not have justifiably relied on the statements because he was an at-will employee. (CVSA Mem. in Supp. 19-21).

McDonnell testified in his deposition that during his May 2000 visit, Bush told him that there was about a three-year partnership track. (McDonnell Dep. 76). Bush told McDonnell that everyone had been made partner and shareholder and that no one had voluntarily left the group. (McDonnell Dep. 111).

The Employment Agreement contained an integration clause and stated the following:

> It is expected by the Corporation that in the event the employment relationship proves to be mutually satisfactory at the end of the initial thirty-six (36) month term of this Agreement, the Employee will be offered the privilege of purchasing shares of the

> common, no par voting stock of the Corporation and that ultimately the Employee shall achieve full parity of stock ownership with the other physicians in similar circumstances. Provided, however, that this provision shall not constitute a contractual commitment to the Corporation to offer stock to Employee, nor shall Employee be contractually committed hereby to purchase said stock. Such stock purchase shall be only upon the terms and conditions as may be agreed upon between the parties at the time it is offered.

(Employment Agreement ¶¶ 13, 17).

The Employment Agreement therefore memorialized the parties' oral discussions on the stock issue. McDonnell testified in his deposition that he relied on Bush's statements and the Employment Agreement's language when deciding whether to accept the job. The Court holds that information was material to McDonnell's decision, as it related to potential benefits of McDonnell's employment with CVSA.

The third element of fraud is that the statement was made falsely, with knowledge of its falsity. According to McDonnell, he asked Watson during a September 2001 CVSA monthly meeting whether CVSA's promises to him were still in effect. Watson stated, with other directors present, that Watson never intended for McDonnell to become a partner. (McDonnell Dep. 306-307).[4] No other directors vocally disagreed with Watson's statement at the meeting. *Id.* In response, CVSA asserts that Watson's statements were

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[4] Watson disputes saying that. (CVSA Mem. in Supp. 20 n.4). For purposes of this motion only, the Court must accept McDonnell's assertion as true.

only his opinion and therefore not attributable to CVSA. (CVSA Mem. in Supp. 21). Additionally, CVSA notes that McDonnell admitted that no other CVSA director told him he would not be made partner and shareholder. (McDonnell Dep. 310).

This situation presents two issues. The first is whether Watson's statement is hearsay. Hearsay statements may not be considered on summary judgment motions. *Schering-Plough Healthcare Prods. Sales Corp.*, 176 F.3d 921, 927 (6th Cir. 1999). Whether the proffered evidence is hearsay under the Federal Rules of Evidence is a question of law. *Id.*

Anticipating this, McDonnell noted that Watson was a CVSA director when he made the statement. (Coey Dep. Ex. 1). Thus, McDonnell argues that because Watson was a director, his statements are imputable to CVSA "as an admission" of a party opponent under Fed. R. Evi. Rule 801(d)(2)(D). That rule provides, in relevant part, that a "statement is not hearsay if . . . the statement is offered against a party and is . . . a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship." Here, McDonnell offers Watson's statement against CVSA. Further, Watson's status as a director made him an agent of CVSA. Moreover, Watson was acting within the scope of his employment with, and his status as a director of, CVSA because he made the statement at the CVSA meeting and the statement dealt with potential benefits of employment. Consequently, the Court holds that Watson's statement was not hearsay and the Court may therefore consider it as evidence in determining whether to grant CVSA's motion for summary judgment. *See Carter v. Univ. of Toledo*, 349 F.3d 269, 274 (6th Cir. 2003) (holding that administrator's response to employee's inquiry as to why she was not rehired

were admissions of a party-opponent under Fed. R. Evid. 801(d)(2)(D)).

The second issue is whether Watson's statement was merely his opinion, or if the rest of the shareholders present at the meeting intended to adopt or agree with Watson's statement through their silence. (CVSA Mem. in Supp. 20). This issue is key, as decisions regarding the opportunity to purchase stock were made by CVSA's then-existing stockholders.[5] Given these circumstances, McDonnell has presented genuine issues of material fact. As such, the Court denies CVSA's motion for summary judgment on McDonnell's fraudulent misrepresentation claim regarding the potential opportunity to purchase stock.

II. WRONGFUL DISCHARGE IN VIOLATION OF

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[5] McDonnell argues that he could only become a shareholder if CVSA's stockholders voted unanimously to allow him to purchase shares. (Pl.'s Mem. in Opp'n 16). The document that McDonnell relies on to support this argument fails to do so. The cited document only provides for "(a) the purchase by the Company of a deceased, terminated, or disabled Stockholder's interest therein; (b) the purchase by the Company of a Stockholder's share should he desire to dispose of any of his stock in the Company during his lifetime, and (c) the funds necessary to carry out such purpose." (Bush Dep. Ex. 42 to Pl.'s Mem. in Opp'n at recitals). The document therefore fails to address the situation at hand. However, the record is less than clear as to whether a majority or unanimous vote was required regarding the opportunity to purchase stock. For example, Bush stated in his affidavit that a majority vote was needed. (Bush Aff. ¶ 12). However, Bush testified in his deposition that a unanimous vote was necessary. (Bush Dep. 129). Because genuine issues of material fact exist regarding the type of vote needed, this is another reason summary judgment is improper on this aspect of McDonnell's claim.

PUBLIC POLICY

McDonnell asserts that CVSA constructively discharged him in violation of public policy in retaliation for his refusal to sign the PRA. McDonnell contends that the PRA violated the Stark Law and Anti-Trust Statute, and that if he had signed it, he would have "participated in an illegal plan to defraud the United States and the State of Ohio."[6] (Pl.'s Second Am. Compl. ¶¶ 39-52). CVSA asserts that the PRA would have been legal if McDonnell signed it.

As a threshold issue, CVSA first argues that McDonnell's status as an at-will employee prevents him from bringing this claim. (CVSA Mem. in Supp. 25) (citing Employment Agreement ¶ 6). CVSA is wrong. The Ohio Supreme Court held "A claim of wrongful discharge in violation of public policy, ... originated, and is generally conceived in Ohio and elsewhere, as an exception to the at-will doctrine." *Coolidge v. Riverdale Local Sch. Dist.*, 100 Ohio St.3d 141, 144, 2003 Ohio 5357, 797 N.E.2d 61 (2003). The court noted "public policy warrants an exception to the at-will doctrine when an employee is discharged or disciplined for a reason which is prohibited by statute." *Wiles v. Medina Auto Parts,* 96 Ohio St.3d 240, 242, 2002 Ohio 3994, 773 N.E.2d 526 (2002).

The four elements of an Ohio common law claim for wrongful discharge in violation of public policy are:

> 1. That clear public policy existed and was manifested in a state or federal constitution, statute or administrative regulation, or in the common law (the

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[6] Ohio's statutes on the issue correspond to the federal statutes. (*See* Pl.'s Second Am. Compl. ¶ 15).

clarity element).

2. That dismissing employees under circumstances like those involved in the plaintiff's dismissal would jeopardize the public policy (the jeopardy element).

3. The plaintiff's dismissal was motivated by conduct related to the public policy (the causation element).

4. The employer lacked overriding legitimate business justification for the dismissal (the overriding justification element).

Wiles, 96 Ohio St.3d at 242. The clarity and jeopardy elements are questions of law. *Collins v. Rizkana,* 73 Ohio St.3d 65, 70, 1995 Ohio 135, 652 N.E.2d 653 (1995). The causation and overriding justification elements are questions of fact. *Id.*

Congress manifested a clear public policy by enacting the Stark Law, 42 U.S.C. § 1395nn, and the Anti-Kickback Statute, 42 U.S.C. § 1320a-7b. In 1989, Congress enacted Stark to address the strain placed on the Medicare Trust fund by the overutilization of certain medical services by physicians who, for their own financial gain rather than their patients' medical needs, referred patients to entities in which the physicians held a financial interest. *American Lithotripsy Soc'y v. Thompson,* 215 F. Supp. 2d 23, 26 (D. D.C., 2002). "The legislation, . . . reflected Congress' concern that such a financial interest 'can affect a physician's decision about what medical care to furnish a patient and who should furnish the care.'" *Am. Lithotripsy Soc'y,* 215 F. Supp. 2d at 26 (quoting 63 Fed. Reg. 1659, 1660 (Jan. 9, 1998)). To that end, the relevant provision prohibits doctors from ordering "designated health services" for Medicare patients from

entities with which the physician, or members of the physician's family, has a "financial relationship." 42 U.S.C. § 1395nn(a)(1).

Similarly, the Anti-Kickback Statute "represents a cumulation of several years of Congressional effort to combat fraud and abuse in the Medicare and Medicaid programs." *United States v. Neufeld,* 908 F.Supp. 491, 493 (S.D. OH 1995) (Smith, J). Congress was concerned with "wasting of program funds through fraud" thereby leading to "adverse financial consequences." H.R. Rep. No. 95-393, pt. 2, at 44 (1977), reprinted in 1977 U.S.C.C.A.N. 3039, 3047. "That principal remains unwavering now and the Anti-Kickback Statute, in its present incarnation, seeks particularly to criminalize various payment and business practices intended to induce patient referrals, which contribute to such frauds." *Robert Wood Johnson Univ. Hosp., Inc. v. Thompson,* 2004 U.S. Dist. LEXIS 8498, *21-22 (D. N.J., 2004)

The Court holds that Congress, through the passage of the Stark Law and the Anti-Kickback Statute, evinced a clear public policy to prohibit abusive self-referrals and kickbacks in the healthcare industry. Neither the Stark Law nor the Anti-Kickback Statute is absolute, however. In passing the law and the statute, Congress realized that certain exceptions may be necessary. A PRA is an exception to the Stark Law and to the Anti-Kickback Statute. 42 U.S.C.S § 1395nn(e)(5) (Stark); 42 C.F.R. § 1001.952(n) (Anti-Kickback).

The jeopardy element is next. That element requires the Court to determine whether CVSA's alleged dismissal of McDonnell under the present circumstances would jeopardize the public policy set forth in the Stark Law and the Anti-Kickback Statute. The Court holds that CVSA did not violate public policy here.

CVSA did not terminate McDonnell for failing to sign the PRA. Rather, McDonnell alleges that CVSA retaliated against him for refusing to sign the PRA by not: (1) providing coverage; (2) giving him reasonable time off, and (3) permitting him to transfer to Columbus at the end of the Employment Agreement. (Pl.'s Second Am. Compl. ¶ 46). CVSA's retaliation, McDonnell contends, resulted in CVSA's constructively discharging him. (*See* Pl.'s Mem. in Opp'n 22).

It is axiomatic that in order to maintain his wrongful discharge in violation of public policy claim, McDonnell must establish that CVSA violated public policy. The thrust of McDonnell's argument is that the PRA was illegal and therefore violated public policy under the Stark Law and the Anti-Kickback Statute. *Id.* at 19-22. However, the Court held in its July 28, 2004 Opinion & Order that the PRA was legal under both the Stark Law and the Anti-Kickback Statute. (July 28, 2004 Opinion & Order 11, 18). Consequently, McDonnell cannot establish that CVSA violated public policy by allegedly constructively discharging him for failing to sign the PRA.[7] Under these circumstances, no genuine issue of material fact exists and McDonnell is entitled to judgment as a matter of law on McDonnell's wrongful discharge in violation of public policy claim.

III. BREACH OF THE EMPLOYMENT AGREEMENT

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[7] Because the Court holds that CVSA did not violate public policy, the Court need not address the constructive discharge issue.

McDonnell sets fourth four grounds in support of his argument that CVSA breached the Employment Agreement. In particular, McDonnell alleges that CVSA breached the agreement by: (1) coercing McDonnell to sign the PRA; (2) denying McDonnell the opportunity to become a shareholder; (3) reneging on its promise that McDonnell could relocate to Columbus at the end of the Employment Agreement, and (4) failing to provide adequate coverage. (Pl's Second Am. Compl. ¶¶ 55, 56, 58). CVSA counters that McDonnell's status as an at-will employee prevented its request of McDonnell from being a breach and that the Employment Agreement did not impose an obligation on CVSA to let McDonnell purchase stock. (CVSA Mem. in Opp'n 9, 10). Further, CVSA asserts that it was never under any obligation to allow McDonnell to relocate to Columbus, and that McDonnell's admission that he did not want more time off destroys his coverage argument. *Id.* at 14-20.

The Restatement (Second) of Contracts § 1 (1977) defines a contract as "a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty." To state a claim for breach of contract, McDonnell must establish that a contract existed; he performed; CVSA unjustifiably failed to perform, and that damages resulted from the breach. *See Ledain v. Town of Ontario,* 192 Misc. 2d 247, 746 N.Y.S.2d 760, 763 (N.Y. Sup. Ct. 2002).

Neither party disputes that the Employment Agreement was a valid, enforceable contract. Likewise, CVSA fails to allege that McDonnell did not perform his duties under the Employment Agreement. The problem arises with CVSA's alleged failure to perform.

A. PRA

McDonnell maintains that CVSA breached the employment agreement by coercing him to sign the PRA. (Pl.'s Mem. in Opp'n 26). CVSA responds that it was within its rights to propose a change to the Employment Agreement because McDonnell was an at-will employee. (CVSA Mem. in Supp. 15; Reply 9). CVSA's argument prevails.

The Court previously held that Genesis did not "coerce" McDonnell to sign the PRA. (July 30, 2004 Opinion & Order 18). Specifically, the Court noted

> On March 21, 2001, McDonnell met with representatives from Genesis and CVSA at Zanesville. McDonnell asserts that Genesis attempted to coerce McDonnell into signing the PRA at that meeting. The record reveals otherwise. McDonnell's testimony at the deposition revealed that Genesis and CVSA asked McDonnell to sign the PRA so that payments between Genesis and CVSA would be legal. No one yelled, no one raised their voice and no threats were made.

Id. (internal citations omitted). The Court holds that CVSA did not coerce McDonnell to sign the PRA for the same reasons that it held that Genesis did not coerce him to sign the PRA.

McDonnell was an at-will employee. (Employment Agreement ¶ 6). The Ohio Supreme Court held that either an employer or an employee in an at-will relationship may propose to change the terms of their employment relationship at any time. *Lake Land Empl. Group of Akron, LLC v. Columber*, 101 Ohio St. 3d 242, 247, 2004 Ohio 786, 804

N.E.2d 27 (2004).[8] The PRA would have required McDonnell to stay in Zanesville for seven years, instead of the three years as provided in the Employment Agreement. From this, it is clear to the Court that CVSA's asking McDonnell was merely a proposal to change the terms of the employment relationship that existed between it and McDonnell. This is certainly permitted under *Lake Land*. Additionally, the Court notes that McDonnell never signed the PRA. So, even if CVSA was not permitted to propose a change in the employment relationship between CVSA and McDonnell, no breach occurred. Thus, there is no genuine issue of material fact and CVSA is entitled to judgment as a matter of law on McDonnell's PRA breach of the Employment Agreement claim.

B. STOCK OPTIONS

McDonnell next contends that CVSA breached the employment agreement by denying him the opportunity to be a shareholder. In particular, McDonnell alleges that "the decision about [stock] ownership was unilaterally announced after he had been employed less than a year." McDonnell relies on an alleged statement of Watson to establish anticipatory breach.[9] (Pl.'s Mem. in Opp'n 27). CVSA responds that the promise to consider offering McDonnell stock was illusory and therefore unenforceable. (CVSA Reply 12).

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[8] The court also stated that if the at-will employee did not like the proposal and was unable negotiate a tolerable agreement, the employee's remedy was to quit. *Lake Land*, 101 Ohio St.3d at 247.

[9] Again, Watson disputes making the statement. For purposes of this motion only, the Court assumes that Watson did make the statement.

In support of his argument, McDonnell refers to Watson's statement at the September 2001 CVSA meeting that he never intended for McDonnell to become a shareholder.[10] McDonnell contends that "Dr. Watson's announcement, to which none of the other shareholders objected, was effectively CVSA's repudiation and breach of its promise at § 13 of the Employment Agreement to evaluate McDonnell for stock ownership at the end of 36 months." (Pl.'s Mem. in Opp'n 28) (internal citations omitted). In essence, McDonnell argues that the Employment Agreement imposed an affirmative duty on CVSA to refrain from deciding whether to offer stock until the end of McDonnell's contract.

For ease of reference, the pertinent provision of the Employment Agreement states:

> It is expected by the Corporation that in the event the employment relationship proves to be mutually satisfactory at the end of the initial thirty-six (36) month term of this Agreement, the Employee will be offered the privilege of purchasing shares of the common, no par voting stock of the Corporation and that ultimately the Employee shall achieve full parity of stock ownership with the other physicians in similar circumstances. Provided, however, that this provision shall not constitute a contractual commitment to the Corporation to offer stock to Employee, nor shall Employee be contractually committed hereby to purchase said stock. Such stock purchase shall be only upon the terms and conditions as may be agreed upon between the parties at the time it is offered.

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[10] The Court need not repeat here the hearsay analysis from above on this statement.

(Employment Agreement ¶ 13).

Contracts "are not to be construed so as to arrive at absurd or impossible results." *Cincinnati v. Cameron*, 33 Ohio St. 336, 364 (1878). To quote CVSA, the Court finds that McDonnell's interpretation would create absurd results. (CVSA Reply 11). As CVSA correctly points out, "McDonnell's argument would render nugatory the entire at-will nature of the Employment Agreement, as any termination within the time frame of the agreement would also necessarily breach CVSA's purported obligation to 'evaluate McDonnell for stock ownership at the end of 36 months.'" (CVSA Reply 11) (citing Pl.'s Mem. in Opp'n 28). Indeed, McDonnell's proposed construction of the contract would make McDonnell himself liable for terminating the contract for failing to wait until the Employment Agreement ended before deciding whether to purchase CVSA stock. Given that McDonnell's interpretation of the contract leads to an absurd result, the Court holds that CVSA is entitled to judgment as a matter of law on McDonnell's claim for breach of the Employment Agreement regarding stock options.

C. RELOCATION

McDonnell argues that CVSA "promised" to allow him to transfer to Columbus after his three year term expired. (Pl.'s Second Am. Compl. ¶ 56). CVSA asserts that no promise was ever made. Alternatively, CVSA argues that even if such a promise were made, it was unenforceable under the Statute of Frauds and under the Employment Agreement, which had an integration clause and was silent on the subject. (CVSA Mem. in Supp. 12-14). The Court has reviewed the record and holds that CVSA is entitled to judgment as a matter of law on this claim.

McDonnell states that Bush told him that because several CVSA partners would be retiring between 2000-2003, "it would all work out" so that McDonnell could relocate to Columbus at the end of the Employment Agreement.[11] (McDonnell Dep. 281-83). However, McDonnell also admitted that Bush told him that the relocation was a possibility, and that Bush did not guarantee the relocation would ever occur. *Id.* at 292. Accordingly, McDonnell admitted that the issue of relocating to Columbus was not a term or condition of his employment with CVSA.[12] *Id.* at 282-83. Thus, there was no guarantee that the relocation would happen; no date was specified for it to occur, and no details regarding the terms and conditions of the move existed.

A promise that is too uncertain in terms for possible enforcement is an illusory promise. *Deken v. Therapeutic Patient System, Inc.*, 1991 Ohio App. LEXIS 3209 (Ohio App. 9th Dist. 1991). Illusory promises are not enforceable. *Century 21 v. McIntyre,* 68 Ohio App.2d 126, 427 N.E.2d 534, syllabus (1980). The alleged promise in this case lacks sufficient detail in all significant respects. As such, the Court holds that the alleged promise is illusory and therefore unenforceable under *Century 21.*

Even assuming, arguendo, that the alleged promise was not illusory, the Statue of Frauds still bars McDonnell's claim. It is well settled that "no action shall be brought

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[11] Again, the Court may not consider hearsay statements in motions for summary judgments. Following the analysis set forth above regarding admissions of a party-opponent, the Court holds that the statement is admissible here for the same reasons.

[12] Indeed, McDonnell failed to raise the issue when he received CVSA's letter of intent, which was silent on the issue. *Id.* at 282.

whereby the defendant is charged upon an agreement that is not to be performed within one year from the making thereof; unless the agreement is in writing and signed by the party to be charged." *Sherman v. Haines*, 73 Ohio St.3d 125, 126, 1995 Ohio 222, 652 N.E.2d 698 (1995). No such writing exists here. As a result, McDonnell's relocation claim is barred by the Statute of Frauds.

As no genuine issue of material fact exists, CVSA is entitled to judgment as a matter of law on McDonnell's relocation breach of the Employment Agreement claim.

D. COVERAGE

McDonnell's final argument deals with the issue of coverage. McDonnell asserts that CVSA retaliated against him for failing to sign the PRA by failing to provide doctors to aid McDonnell in the coverage of CVSA's responsibility to provide 24/7 coverage for Zanesville's heart program. By so doing, McDonnell contends that CVSA breached the employment agreement. (Pl.'s Second Am. Compl. ¶ 55). CVSA maintains that McDonnell's deposition testimony refutes this claim. CVSA is correct.

McDonnell admitted in his deposition testimony that CVSA did not change the terms and conditions of his employment, or the "day to day working relationships at Zanesville" after he refused to sign the PRA. (McDonnell Dep. at 258, 259, 318). McDonnell further admitted that he got four weeks of paid vacation that the Employment Agreement provided for. (McDonnell Dep. 243-44; McDonnell Aff. ¶ 7). Because McDonnell got his four weeks of vacation, coverage simply could not have been an issue. Accordingly, McDonnell admitted that he never complained about lack of coverage. (McDonnell Dep. 254, 255, 258).

Moreover, the record is devoid of any "retaliation" by CVSA in terms of coverage. Consequently, no genuine issue of material fact exists and CVSA is entitled to judgment as a matter of law on McDonnell's claim for breach of the Employment Agreement relative to his coverage argument.

CONCLUSION

For the reasons stated above, the Court **GRANTS** CVSA's motion for summary judgment on McDonnell's claims for: fraudulent omission of the PRA; fraudulent misrepresentation regarding reasonable time off; wrongful discharge in violation of public policy; breach of the employment agreement regarding the PRA; breach of the Employment Agreement regarding relocation; breach of the Employment Agreement regarding coverage, and breach of the Employment Agreement regarding stock options. The Court **DENIES** CVSA's motion for summary judgment on McDonnell's claims for fraudulent failure to disclose the ESA's due process provision, and fraudulent misrepresentation about the opportunity to purchase stock.

IT IS SO ORDERED.

/s/ Gregory L. Frost
GREGORY L. FROST
UNITED STATES DISTRICT JUDGE

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. C2-03-0079

[Filed July 30, 2004]

BRYAN E. McDONNELL,	)
Plaintiff,	)
	)
v.	)
	)
CARDIOTHORACIC & VASCULAR	)
SURGICAL ASSOCIATES, INC., et al.,	)
Defendants.	)
	)

GREGORY L. FROST,
UNITED STATES DISTRICT JUDGE
Magistrate Judge Kemp

OPINION AND ORDER

This matter is before the Court on Defendant Genesis Health Care's ("Genesis") Motion for Summary Judgment (Doc. # 108); Plaintiff Bryan McDonnell's ("McDonnell") Memorandum in Opposition (Doc. # 124), and Genesis'

Reply Memorandum (Doc. # 133). For the following reasons, the Court GRANTS Genesis' motion.

BACKGROUND

McDonnell is a board-certified general and cardiothoracic surgeon. (Pl.'s Second Am. Compl. ¶ 1). Genesis is an Ohio nonprofit corporation engaged in providing health care services. *Id.* at P2. It owns and operates the Zanesville Hospital and Bethesda Hospital in Zanesville. *Id.* CVSA is a professional corporation that provides cardiothoracic and vascular surgical services at Ohio hospitals. *Id.* at P3. CVSS took over CVSA's business in January 2003. *Id.* at P5. As such, CVSS is the successor in interest to CVSA.[1] *Id.*

Genesis wanted to establish an open-heart surgery program at the Zanesville Hospital and contacted CVSA to discuss the possibility of CVSA becoming the exclusive provider of open-heart surgery services at that facility. CVSA was interested, but did not want to incur any financial losses. As such, Genesis and CVSA discussed the possibility of Genesis financially supporting CVSA by compensating CVSA for its operating expenses at the Zanesville location in order to prevent any loss. However, in order for the support to be legal under federal health care statutes, Genesis and CVSA agreed that a Physician's Recruitment Agreement ("PRA") would be needed. (Pl.'s Memo. Support 6). Genesis' attorney drafted a preliminary PRA and forwarded it to CVSA's attorney in March 2000. *Id.* at 7. The parties to the PRA would be Genesis and the selected physician. *Id.*

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[1] The Court will use CVSA to refer to CVSA and CVSS.

Subsequently, Genesis signed an Exclusive Services Agreement for Cardiothoracic Surgery Program ("ESA") with CVSA in August 2000. *Id.* at ¶ 12. Pursuant to that agreement, Genesis agreed that CVSA would be the exclusive provider of certain surgical procedures at the Zanesville Hospital, including open-heart surgery. (ESA at 1.1). Accordingly, CVSA agreed to provide a full-time cardiothoracic surgeon in order to establish an open heart surgery program at the Zanesville Hospital. *Id.* at 1.2. However, the surgeon was to be an employee of CVSA, and nothing in the ESA "shall be construed to create between Genesis and CVSA or Genesis and any employees or agents of CVSA an employer-employee relationship...." *Id.* at 11. Additionally, CVSA agreed to provide coverage for the selected physician when the doctor was on vacation or otherwise unavailable. *Id.* at 1.2. In return, Genesis agreed to hire and pay necessary support personnel and obtain required equipment. *Id* at 5.1, 5.2. CVSA agreed to bill patients directly for services rendered, while Genesis would separately bill the patients for facility charges. *Id.* at 7.1. McDonnell was not a party to this agreement. (Pl.'s Second Am. Compl. ¶ 12).

McDonnell visited Genesis as a candidate for the physician position in May 2000. (Pl.'s Memo. in Support p.7). Genesis did not tell McDonnell about the PRA during his visit. *Id.* at 7.

McDonnell signed an Employment Agreement ("Employment Agreement") with CVSA on September 19, 2000. (Pl.'s Am. Compl. at 9). At the time McDonnell signed the Employment Agreement, he was not aware of the ESA. *Id.* at ¶ 12. The Employment Agreement had a term of three years and provided that either party could terminate the Employment Agreement at any time with or without cause

with notice. (Employment Agreement at ¶ 6). Additionally, the agreement permitted McDonnell to take four weeks paid vacation during his first year, and six weeks during his second and third years. *Id.* at ¶ 8. The Employment Agreement also stated that McDonnell would have the right to purchase CVSA stock if "the employment relationship proves to be mutually satisfactory at the end of the initial 36 month term of this agreement." *Id.* at ¶ 13. Finally, the agreement stated that "This document contains the entire agreement between the parties and supersedes any prior understandings or agreements between them and the subject matter." *Id.* at ¶ 17.

McDonnell and his family subsequently relocated from Maryland to Zanesville and performed his first operation in late October 2000. (Pl.'s Second Am. Compl. at ¶ 11). In early February 2001, Genesis and CVSA delivered the PRA to Dr. McDonnell for signature. *Id.* at ¶ 19. The PRA was prepared by either CVSA, Genesis, or both parties together. *Id.* The PRA contained ancillary agreements, including a Security Agreement; a Consent to Assignment; an Agreement of Assignment (collectively the "Ancillary Agreements"); and a Cognovit Promissory Note. *Id.* The parties to the proposed PRA were Genesis and McDonnell. *Id.* at ¶ 20.

Among other things, the PRA, by its name, purported to "recruit" McDonnell to provide cardiothoracic surgery services at the Zanesville Hospital and a guarantee that Genesis would provide him a minimum annual compensation for a 3-year period. (Pl.'s Second Am. Compl. ¶ 20.) The Cognovit Note, in the amount of $960,000.00, would have required McDonnell to repay all or a portion of the annual compensation payments provided for in the PRA if he were to leave the Zanesville area before the expiration of seven years. *Id.* at ¶ 21. The Consent to Assignment Agreement, which Genesis, Dr. McDonnell, and CVSA were all to be parties to,

permitted Genesis to pay directly to CVSA the payments that it would otherwise be making to Dr. McDonnell under the PRA. *Id.* The Security Agreement, entered into by CVSA and Genesis, gave Genesis the right to collect, among other things, CVSA's and Dr. McDonnell's accounts receivable. *Id.*

McDonnell declined to sign the PRA, Cognovit Promissory Note, and Ancillary Agreements. *Id.* at ¶ 22. CVSA and Genesis then demanded that McDonnell sign the documents. *Id.* at ¶ 27. When McDonnell refused, Genesis, CVSA and McDonnell attempted to reach a satisfactory agreement but were unable to do so. McDonnell then submitted a resignation letter on January 8, 2002. *Id.* at ¶ 58.

Thereafter, McDonnell filed this suit alleging that CVSA: (1) committed fraud; (2) wrongfully (constructively) discharged McDonnell in violation of public policy, and (3) breached the Employment Agreement. McDonnell also asserted that Genesis had committed fraud and had tortiously interfered with McDonnell's employment relationship with CVSA.

Genesis' Motion for Summary Judgment and McDonnell's response in opposition are now before the Court.

STANDARD OF REVIEW

The procedure for considering whether summary judgment is appropriate is set forth in Federal Rule of Civil Procedure 56(c), which provides:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is not genuine issue as to any material

> fact and that the moving party is entitled to judgment as a matter of law. The evidence must be viewed in the light most favorable to the nonmoving party.

Adickes v. Kress & Co., 398 U.S. 144, 158-159, 90 S. Ct. 1598, 26 L. Ed. 2d 142 (1970). Summary judgment will not lie if the dispute about material fact is genuine; "that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). Summary Judgment is appropriate however, if the opposing party fails to make a showing sufficient to establish the existence of an element essential to that party's case and on which that party will bear the burden of proof trial. *Celotex Corp. v. Catrett,* 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986); *see also Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986).

Additionally, in responding to a summary judgment motion, the nonmoving party "cannot rely on the hope that the trier of fact will disbelieve the movant's denial of a disputed fact, but must 'present affirmative evidence in order to defeat a properly supported motion for summary judgment'" *Id.* (quoting *Liberty Lobby,* 477 U.S. at 257). The non moving party must adduce more than a mere scintilla of evidence in order to overcome the summary judgment motion. *Id.* It is not sufficient for the nonmoving party to merely "'show that there is some metaphysical doubt as to the material facts.'" *Id.* (quoting *Matsushita,* 475 U.S. at 586). Moreover, "the trial court no longer has the duty to search the entire record to establish that it is bereft of a genuine issue of material fact." *Id.* That is, the nonmoving party has an affirmative duty to direct the court's attention to those specific

portions of the record upon which it seeks to rely to create a genuine issue of material fact.

DISCUSSION

I. FRAUD

A. PRA

McDonnell alleges that Genesis had a duty to disclose information regarding its intention to require McDonnell to sign the PRA, Cognovit Promissory Note, and Ancillary Agreements (collectively "PRA"). (Pl.'s Mem. In Opp'n 10-14). He submits that such information was material and would have, if disclosed, affected McDonnell's decision to relocate to Zanesville. (Pl.'s Second Am. Compl. ¶ 62). McDonnell alleges that Genesis' duty to disclose the PRA arose from (1) a fiduciary or de facto fiduciary relationship between McDonnell and Genesis and (2) Genesis' written policy that required Genesis to discuss the PRA with physician candidates during the physician's initial visit to Genesis. (Pl.'s Mem. In Opp'n 10). Each argument fails.

To sustain a claim for fraud pursuant to Ohio law, a plaintiff must establish: (1) a representation or, where there is a duty to disclose, concealment of a fact; (2) which is material to the transaction at hand; (3) made falsely, with knowledge of its falsity, or with such utter disregard and recklessness as to whether it is true or false that knowledge may be inferred; (4) with the intent of misleading another into relying upon it; (5) justifiable reliance upon the representation or concealment, and (6) a resulting injury proximately caused by the reliance. *See Russ v. TRW, Inc.*, 59 Ohio St. 3d 42, 570 N.E.2d 1076, 1084 (1991). Where a fraud claim is based solely upon an alleged concealment, or failure to speak, rather

than an affirmative misrepresentation, such silence is only actionable for fraud where the law imposes a duty a speak. *See Schulman v. Wolske & Blue Co., L.P.A.*, 125 Ohio App.3d 365, 372, 708 N.E.2d 753 (1998); *see also Kratzer v. O'Brien*, 1994 Ohio App. LEXIS 5247, 1994 WL 667962, *2 (Ohio App. 5 Dist. Oct. 31, 1994).

McDonnell alleges that Genesis failed to tell him material information regarding Genesis' and/or CVSA's intention to use the PRA. Such information, McDonnell argues, would have influenced his decision on whether to relocate to Zanesville. Because McDonnell asserts a claim for fraud against Genesis based upon a failure to disclose information, the Court must first determine whether Genesis had a duty to disclose that information.

A duty to speak arises when one party has information that the other party is entitled to know because of a fiduciary or other similar relationship of trust between them. *See Ed Schory & Sons v. Francis*, 75 Ohio St. 3d 433, 1996 Ohio 194, 662 N.E.2d 1074, 1081 (1996). This is referred to as a fiduciary relationship. A duty to disclose may also arise out of "an informal relationship where both parties to a transaction understand a special trust or confidence has been reposed." *Blon v. Bank One, Akron, N.A.*, 35 Ohio St. 3d 98, 519 N.E.2d 363, 367 (1988). This is known as a de facto fiduciary relationship. Thus, in this situation, a duty to disclose would arise if and when a fiduciary relationship existed between Genesis and McDonnell, or if a de facto fiduciary relationship existed between the two.

It is clear to the Court that Genesis and McDonnell did not share a fiduciary relationship. When McDonnell visited Genesis in May 2000 as a candidate, nothing was said about the terms and conditions of his possible employment with

CVSA. (Pl.'s Dep. 74-75, 95-96; Pl.'s Mem. in Opp'n 14). Further, once McDonnell accepted the job, he became an employee of CVSA, not Genesis. As a result, the Court finds that no fiduciary relationship existed between Genesis and McDonnell.

McDonnell next asserts that a de facto fiduciary relationship existed between him and Genesis as a result of McDonnell's May 2000 visit to Genesis as a candidate. (Pl's Mem. in Opp'n 13-14). For this type of relationship to have existed, *both* parties must understand that the relationship is one of special trust and confidence. *See DeMuesy v. Haimbaugh,* 1991 Ohio App. LEXIS 6407, 1991 WL 281411 (Ohio App. 10th Dist. Dec. 31, 1991) (emphasis added). A de facto fiduciary relationship exists only where both parties understand a special trust and confidence has been reposed. *Blon v. Bank One, Akron,* 35 Ohio St. 3d 98, 519 N.E.2d 363, 367 (1988). "A party's allegations that he reposed a special trust or confidence in [another] is insufficient as a matter of law to prove the existence of a fiduciary relationship." *Schulman v. Wolske & Blue Co.,* 125 Ohio App.3d 365, 372, 708 N.E.2d 753 (1988).

No mutual understanding is present here. McDonnell asserts that he placed trust and confidence in Genesis from his May 2000 visit. However, McDonnell admits that the parties did not discuss his potential employment with CVSA at that time. Additionally, nothing in the record indicates that Genesis reciprocated McDonnell's trust and confidence. Therefore, under *Blon,* no de facto fiduciary relationship existed between McDonnell and Genesis.

Nonetheless, McDonnell relies on *Leal v. Holtvogt,* 123 Ohio App.3d 51, 76, 702 N.E.2d 1246 (Ohio App. 2nd Dist. Aug. 7, 1998), to support his argument that a de facto

fiduciary relationship existed. In *Leal,* the Court held that a duty to disclose arose when horse buyers trusted the knowledge and expertise of the seller, a professional trainer, and that the seller knew the buyers were not experienced in the industry. *Id.*

McDonnell's reliance on *Leal* is misplaced. Initially, *Leal* was a fraudulent misrepresentation case. In contrast, Genesis did not disclose any information to McDonnell about his employment with CVSA, so this case is more akin to fraudulent concealment. Additionally, McDonnell does not argue that he was not: (1) experienced in heart surgery; (2), familiar with PRAs, or (3) familiar with or the business that goes along with being a heart doctor. Nor could he, with his lengthy professional background. Consequently, McDonnell cannot establish that Genesis knew that McDonnell was not experienced in the industry. As a result, the Court will not utilize *Leal's* logic to hold that a de facto fiduciary relationship existed between Genesis and McDonnell.

McDonnell next cites *Mancini v. Gorick,* 41 Ohio App.3d 373, 374-75, 536 N.E.2d 8 (Ohio App. 9th Dist. Aug. 26, 1987) for the proposition that a de facto fiduciary relationship existed between him and Genesis. McDonnell stated that the *Mancini* Court held that a duty to disclose arose where a home buyer did not have a home inspected for defects because he relied on the seller/builder's expertise as an architectural engineer. (Pl.'s Mem. In Opp'n 14) (citing *Mancini,* 41 Ohio App.3d at 374-75). McDonnell's interpretation of the court's holding is incorrect. First, the *Mancini* case dealt with a contract for the sale of a house and the issue was whether a claim for nondisclosure could be overcome by an "as is" clause in the contract. *Id.* at * * 4-7. The court held that while a nondisclosure claim was insufficient, a claim for fraudulent

concealment would be able to overcome the "as is" clause. In so holding, the *Mancini* court noted:

> nondisclosure will become the equivalent of fraudulent concealment when it becomes the duty of a person to speak in order to that the party with whom he is dealing is may be placed on equal footing with him. The duty to speak does not necessarily depend on the existence of a fiduciary relationship. It may arise in any situation where one party imposes trust and confidence in the other because of that person's position, and the other party knows of this confidence.

Id. at syllabus. Thus, the decision McDonnell relies on merely restates the discussion of the law above. Again, McDonnell does not argue that Genesis reciprocated the trust and confidence that McDonnell placed in Genesis. Consequently, no de facto fiduciary relationship exists in this case under *Mancini*.

McDonnell saves his strongest argument for last. McDonnell alternatively asserts that Genesis had a written policy in effect during McDonnell's May 2000 visit that required Genesis to disclose the PRA's existence to McDonnell at that time. (Pl.'s Mem. in Opp'n 11). Entitled "Genesis Healthcare System Policy/Procedure" the policy at issue states that the procedure regarding PRAs was to share the PRA "with [the] physician at initial visit." *Id.* at Burns Dep. Ex. C2.

Essentially, McDonnell contends that Genesis' policy created a self-imposed duty to disclose the PRA's existence to McDonnell during the May 2000 visit, and Genesis' failure to tell McDonnell about the PRA violated that duty. Genesis counters that the policy was not absolute and that no Ohio

court has held that "an internal administrative guideline is a basis for imposing a duty to speak in a fraudulent omission case." (Genesis Reply Mem. 12).

Vice President of Genesis Al Burns ("Burns") was responsible for physician recruiting. (Burns Dep. 21-22). This responsibility included setting up visits to Genesis for physician candidates who would, and would not, be employed by Genesis. *Id.* at 22-23. Those who would not be employed by Genesis were normally employed by a practice group. *Id.* at 22-24. He testified during his deposition that the PRA was not always shared with a candidate physician during the initial visit. *Id.* at 26. That usually happened when the practice group would employ the physician being recruited. In those situations, "the recruiting group would meet with the physician, explain the contract [PRA] to them, give it to them, and get them to sign it." *Id.* at 65.

Genesis asserts that it believed that McDonnell's visit was one of those situations where CVSA, as McDonnell's employer, would present the PRA to McDonnell. Consequently, Genesis asserts that it followed its normal procedure. However, Genesis argues that a miscommunication between Genesis and CVSA prevented McDonnell from receiving the PRA before he started. That is, Genesis thought that CVSA was going to give McDonnell the PRA. (Burns Dep. 72-73, 106). To that end, Genesis sent CVSA a draft PRA in March 2000. (Smith Dep. 21-23). CVSA, on the other hand, thought that Genesis was going to handle the PRA. (Bush Dep. 54). CVSA Director Dr. Charles Bush testified that he thought that Genesis was handling the PRA, and that the matter was being "dealt with at the attorney level." (Bush Dep. 54-55). Bush's testimony therefore corresponds with the fact that Genesis' attorney had

forwarded a draft PRA to CVSA's attorney in March 2000. (Smith Dep. 21-23).

McDonnell disputes that the miscommunication occurred. (Pl.'s Mem. in Opp'n 3). McDonnell points to Burns' statement in his deposition that he asked Genesis CEO Tom Sieber sometime between August and September 2000 if McDonnell had signed the PRA. According to McDonnell, this disputes Genesis' contention that it thought that CVSA was handling the PRA's presentation. McDonnell failed to cite other portions of Burns' testimony that address the issue, however. Specifically, Burns also testified that when he asked Sieber about the PRA, Burns thought that: (1) CVSA had given the PRA to McDonnell for signature; (2) McDonnell had signed it, and (3) Genesis had not received a copy of it. (Burns Dep. 72). This testimony is entirely consistent with Genesis' argument that it thought that CVSA was handling the PRA's presentation to McDonnell.

The evidence is clear that Genesis followed its normal procedure of allowing CVSA, as McDonnell's employer, to present the PRA to McDonnell. The evidence is likewise clear that CVSA and/or Genesis would have provided the PRA to McDonnell prior to his start date but for the miscommunication. Additionally, the Court notes that even if the policy required Genesis to present the PRA, the policy would have been inapplicable because the PRA had not been completely drafted when McDonnell had his initial visit. (Smith Dep. 44-45 & Ex. 11). Thus, Genesis had nothing to present to McDonnell during his visit.

The Court finds that no fiduciary relationship existed between Genesis and McDonnell. Similarly, no de facto relationship existed between the parties. Finally, Genesis

followed its policy.[2] As a result, Genesis did not have a duty to disclose the PRA to McDonnell. There being no genuine issue of material fact, Genesis is entitled to judgment as a matter of law on McDonnell's fraud claim involving the PRA.

B. OTHER INFORMATION

McDonnell also asserts that Genesis had a duty to disclose that: (1) McDonnell would be responsible for providing 24/7 coverage and (2) if Genesis and CVSA terminated the ESA, McDonnell's staff privileges at Genesis would likewise end. McDonnell argues that Genesis had a duty to disclose that information because that knowledge would have been material to his decision regarding whether to accept the position with CVSA. (Pl's Mem. in Opp'n 16-17).[3] A fact is material if it is likely, under the circumstances, to affect the conduct of a reasonable person with reference to the transaction. *Van*

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[2] Because the Court determined that Genesis followed its policy, the Court need not address whether the policy imposed a duty of disclosure on Genesis under Ohio law.

[3] Genesis asserts that the Court already addressed this issue in the Court's March 15, 2004 Order on Genesis' Motion for Judgment on the Pleadings. (Genesis Mem. in Supp. 13). Genesis is mistaken. In the Court' April 26, 2004 Order, the Court granted McDonnell leave to amend his complaint for a second time. In so holding, the Court stated "a factual dispute exists as to whether Genesis had a duty to disclose to the plaintiff its 'intention to have McDonnell sign the PRA ... and any other material information about its plans for the open heart surgery program[.]'" (April 26, 2004 Opinion & Order 3). The Court's March 15, 2004 order defined "any other material information about its plans for the open heart surgery program" to include the 24/7 and ESA arguments. (March 15, 2004 Opinion & Order 5). Thus, the Court did not dismiss those arguments and the Court will examine them here.

Camp v. Bradford, 63 Ohio Misc. 2d 245, 255, 623 N.E.2d 731 (Butler County Ct. Common Pleas July 29, 1993). Genesis responds by stating that it had no duty to inform McDonnell regarding coverage, and that it likewise did not have a duty to disclose the ESA's existence to McDonnell as a non-party. (Genesis Reply 14, 15).

1. 24/7

Genesis asserts that McDonnell's coverage argument lies with CVSA, as McDonnell's employer, not with Genesis. *Id.* at 14. Genesis is correct. As stated above, McDonnell signed an Employment Agreement with CVSA, not with Genesis. As such, CVSA necessarily would handle the "time and manner" of McDonnell's employment and would be responsible for providing 24/7 coverage, if such coverage proved to be necessary. *Id.* at 14. Moreover, no employer/employee, fiduciary or de facto relationship existed between McDonnell and Genesis.

In brief, Genesis did not have a duty to disclose the coverage issues to McDonnell. No genuine issue of material fact exists as to whether Genesis owed McDonnell a duty to inform him of coverage issues, so Genesis is therefore entitled to judgment as a matter of law on this aspect of McDonnell's claim.

2. ESA

Genesis maintains that it did not have a duty to disclose that if Genesis and CVSA terminated the ESA, McDonnell's staff privileges at Genesis would also terminate (Genesis Reply 14). The Court agrees. The issue of staff privileges is again a matter best addressed with CVSA as McDonnell's employer. No employer/employee relationship existed

between McDonnell and Genesis, and the Court held above that no fiduciary or de facto relationship existed between the two parties either. Furthermore, McDonnell was not a party to the ESA. As a result, Genesis did not have a duty to disclose the terms of the ESA to McDonnell.

Therefore, no genuine issue of material fact exists regarding whether Genesis owed McDonnell a duty to disclose the ESA information, and Genesis is therefore entitled to a judgment as a matter of law with respect to McDonnell's ESA fraud argument.

In brief, each of McDonnell's arguments in support of his fraud claims fail. Consequently, the Court grants Genesis' Motion for Summary Judgment on McDonnell's fraud claims against Genesis.

II. TORTIOUS INTERFERENCE

McDonnell alleges that Genesis tortiously interfered with McDonnell's performance under his Employment Agreement with CVSA in three ways. First, McDonnell claims that Genesis interfered by "coercing and intimidating McDonnell" to sign the PRA, and then by refusing to pay CVSA after McDonnell would not sign the PRA. (Pl.'s Second Am. Compl. ¶ 78). Second, McDonnell argues that Genesis "caused the performance of McDonnell's obligations under the Employment Agreement to be more difficult and burdensome, additionally, by initiating angioplasty procedures at the Zanesville Hospital ... without McDonnell's consent." *Id.* at ¶ 79. Third, McDonnell contends that Genesis tortiously interfered by failing to provide adequate cardiac

anesthesia coverage.[4] *Id.* Arguing that it acted in good faith and therefore lacked the requisite intent, Genesis moves for summary judgment on McDonnell's tortious interference claims.

As a threshold issue, McDonnell contends that summary judgment is inappropriate when issues of intent are involved. (Pl's Mem. in Opp'n 19). In particular, McDonnell argues that intent is a question of fact best left to the jury. *Id.*

The Sixth Circuit held that while issues of intent are "normally not suited for disposition on summary judgment," "no issue is immune from summary judgment." *Heheman v. E.W. Scripps Co.*, 661 F.2d 1115, 1127 (6th Cir. 1981). Further, this Court has granted summary judgment on the issue of fraudulent intent after finding that no evidence of intent to defraud existed. *Scotts Co. v. Cent. Garden & Pet Co.*, 2002 U.S. Dist. LEXIS 26850 (S.D. OH 2002) (Sargus, J.). In so holding, the Court rejected the "highly speculative" inferences offered in support of the argument that fraudulent intent existed. *Id.* at * 6. Finally, Ohio courts have held that summary judgment is proper when a plaintiff presents nothing more than allegations, speculation, and assumptions regarding a defendant's alleged fraudulent intent. *See El-Shiekh v. Northwest Ohio Cardiology Consultants*, 2000 Ohio App. LEXIS 4143, 2000 WL 1298761, *4 (Ohio App. 6th Dis. 2000). With these parameters in mind, the Court will proceed to examine the issues of intent.

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[4] McDonnell also asserts that Genesis tortiously interfered by failing to provide other qualified support staff and by failing to provide adequate office space. (Pl.'s Second Am. Compl. ¶ 79). These allegations were not addressed by the parties in their briefs and will not be addressed here.

Restatement (Second) of Torts § *766A* (1979) (the "Restatement"), titled *Intentional Interference with Another's Performance of His Own Contract,* sets forth the requirements for McDonnell's tortious interference claim. Section 766A provides liability for:

> One who intentionally and improperly interferes with the performance of a contract (except a contract to marry) between another and a third person, by preventing the other from performing the contract or causing his performance to be more expensive or burdensome, is subject to liability to the other for the pecuniary loss resulting to him.

Additionally, the plaintiff must prove that the defendant acted without privilege or justification. *Kenty v. Transamerica Premium Ins. Co.*, 72 Ohio St. 3d 415, 1995 Ohio 61, 650 N.E.2d 863 at Syl. 2 (1995).

The interference with the other's performance of his contract is intentional if the actor desires to bring it about or if he knows that the interference is certain or substantially certain to occur as a result of the action. (Restatement (Second) of Torts § 766A Comment e (1979)). Intent must be inferred from the totality of the circumstances. *Davis v. Sun Refining & Marketing Co.*, 109 Ohio App.3d 42, 55, 671 N.E.2d 1049 (Ohio App. 2nd Dist. Jan. 31, 1996).

The interference must also be improper. A Court should consider numerous factors in determining whether the claimed interference is improper. Those factors include:

> (a) the nature of the actor's conduct, (b) the actor's motive, (c) the interests of the other with which the actor's conduct interferes, (d) the interests sought to

> be advanced by the actor, (e) the social interests in protecting the freedom of action of the actor and the contractual interests of the other, (f) the proximity or remoteness of the actor's conduct to the interference, and (g) the relations between the parties.

Fred Siegel Co., L.P.A. v. Arter & Hadden, 85 Ohio St.3d 171, 178-179, 1999 Ohio 260, 707 N.E.2d 853 (1999) (quoting Restatement (Second) of Torts § 767 (1979)).

Good faith is defined as honesty or lawfulness of belief or purpose. Black's Law Dictionary 278 (Pocket ed. 1996). Numerous courts have held that good faith is a bar to establishing liability for intentional torts. For example, in *Singleton v. HGO Servs., Inc.,* 2001 U.S. Dist. LEXIS 22415, 2001 WL 1729995 (E.D. PA 2001), the Court held that when the "'intent to harm' element is lacking" "a claim for tortious interference with contract cannot be maintained where the defendant acts upon a reasonable good faith belief." *Id.* at * 7. Further, "Where the defendant acts out of a reasonable good faith belief in the propriety of its action, intent to harm is lacking and a claim for tortious interference with contract cannot be maintained." *Schmidt, Long & Assoc. v. Aetna U.S. Healthcare, Inc.* 2001 U.S. Dist. LEXIS 10709, 2001 WL 856946, *3 (E.D. PA 2001).

The Court will now examine whether Genesis' arguments regarding its good faith and lack of intent are sufficient to overcome McDonnell's tortious interference claims relative to his PRA, anesthesia and angioplasty arguments.

A. PRA

To begin, McDonnell states that Genesis tortiously interfered with his performance of his contract with CVSA

by: (1) "coercing and intimidating McDonnell to sign the PRA"; and (2) refusing to pay CVSA after McDonnell did not sign the PRA, which lead to strain and tension between him and CVSA (Pl.'s Am. Compl. ¶¶ 77, 78). Genesis asserts that it did not coerce McDonnell to sign the PRA, acted in good faith to comply with the law, and did not have the intent to interfere. (Genesis Mem. in Supp. 17-19). The Court finds Genesis' arguments persuasive.

On March 21, 2001, McDonnell met with representatives from Genesis and CVSA at Zanesville. (Pl.'s Mem. in Opp'n 31). McDonnell asserts that Genesis attempted to coerce McDonnell into signing the PRA at that meeting. The record reveals otherwise. McDonnell's testimony at the deposition revealed that Genesis and CVSA asked McDonnell to sign the PRA so that payments between Genesis and CVSA would be legal. (McDonnell Dep. 224-28). No one yelled, no one raised their voice and no threats were made. *Id.* at 146-47, 155-56, 224-28.

McDonnell offers nothing but speculation to support his contention that Genesis intentionally interfered with his performance of his CVSA contract by asking him to sign the PRA. Nor could he, because the record is clear that Genesis did not desire to cause interference by asking McDonnell to sign the PRA. To the contrary, any interference would only prevent Genesis from successfully maintaining its heart program because McDonnell was the program's only doctor. Any interference would therefore be detrimental to Genesis. Rather, Genesis asked McDonnell to sign the PRA in the belief that the PRA would enable Genesis to lawfully pay CVSA, a belief this Court found to be true in its July 27, 2004 Opinion & Order. Moreover, other agreements besides the PRA were available to satisfy the Stark Law's exceptions and the Anti-Kickback's requirements in the event McDonnell

declined to sign the PRA. Additionally, Genesis could not have known with any certainty that its inquiry would result in interference as CVSA was aware of the PRA and the Employment Agreement and had not expressed any objection to the PRA. The Court therefore concludes that Genesis lacked the intent necessary to sustain McDonnell's tortious interference claim based upon coercion and intimidation.

The Court's conclusion is buttressed by Genesis' good faith. It is undisputed that Genesis worked with McDonnell and CVSA to resolve the legal issues that resulted from McDonnell's refusal to sign the PRA. Specifically, counsel for Genesis, CVSA and McDonnell drafted a proposed settlement agreement that addressed McDonnell's concerns about coverage, anesthesia and angioplasties. (Genesis Mem. in Supp. Ex. Y). The settlement agreement included the execution of a PRA. *Id.* The parties reviewed several drafts of the settlement agreement, with McDonnell's counsel not striking the language requiring McDonnell to sign a PRA. *Id.* at Ex. AA. Ultimately, however, McDonnell did not sign any of the settlement agreements.

McDonnell then proposed that he, personally, become the exclusive services provider for heart services at Zanesville. (Grauer Dep. 49-50). Genesis thereafter persuaded CVSA to end the Exclusive Services Agreement and drafted a services agreement between Genesis and McDonnell. Under that agreement, Genesis would pay McDonnell $600,000 per year and McDonnell was not required to sign a PRA. (Genesis Mem. in Supp. Ex. EE). McDonnell declined to sign the proposed service agreement.

Later, Genesis offered McDonnell an employment agreement. *Id.* at Ex. HH. Like the proposed settlement agreement, the employment agreement did not include the

PRA and provided that Genesis would pay McDonnell $600,000 annually. *Id.* Again, McDonnell decided not to sign the employment agreement and provided written notice terminating his employment on January 8, 2002.

In February 2001, McDonnell's attorney contacted Genesis to see if an employment agreement could be reached. (Smith Dep. 114). Genesis drafted another agreement and provided it to McDonnell's attorney, only to have McDonnell decline to sign it. (Genesis Mem. in Supp. Ex. II). The Court holds that Genesis' actions illustrate its good faith.

The Court held above that McDonnell would have seen the PRA prior to relocating but for the lapse in communication between Genesis and CVSA. Furthermore, the Court previously held that the PRA would have satisfied the Stark Law and Anti-Kickback statute had it been signed. In addition, the record supports the testimony of McDonnell's attorney that Genesis proceeded in good faith in attempting to find a lawful solution to the situation. (Grauer Dep. 44). As previously stated, good faith is a bar to intentional tort claims. *Singleton,* 2001 U.S. Dist. LEXIS 22415, 2001 WL 1729995 at * 7. From this, it is clear to the court that Genesis acted in good faith and did not intentionally interfere with McDonnell's performance of his CVSA contract by asking McDonnell to sign the PRA. Consequently, the Court holds that no genuine issues of material fact exist and Genesis is entitled to summary judgment as a matter of law as to this argument.

That leaves McDonnell's assertion that Genesis' refusal to pay CVSA resulted in stress and tension between McDonnell and CVSA because McDonnell stood in the way of Genesis paying CVSA. (Pl.'s Mem. in Opp'n 30). Although McDonnell does not explain what events illustrate the stress

and tension that he endured, the Court will assume for purposes of this motion only that stress and tension did result. Again, Genesis responds that it lacked the requisite intent, or, in the alternative, that its failure to pay was justified.

Genesis' intent argument is unpersuasive in this context. Even if Genesis did not intend its refusal to pay CVSA to result in interference with McDonnell's performance of his CVSA contract, which, for the reasons stated above, it most certainly did not, Genesis had to have known the consequences of its omission would be certain or substantially certain to result in interference with McDonnell's performance. All parties agree that Genesis could not pay CVSA until a PRA or another document that satisfied both the Stark Law and Anti-Kickback Statute was executed. Because McDonnell refused to sign the PRA and other proposed documents, he was the reason CVSA was not getting paid. Thus, the Court holds that Genesis did intentionally interfere with McDonnell's performance by not paying CVSA.

This holding is not detrimental to Genesis' argument, however. As previously stated, the interference must have been improper as well as intentional. The Court listed above a number of factors that must be considered in determining whether the interference was improper, and the Court now turns to a discussion of those factors.

The first factor is the nature of Genesis' conduct. Each party agrees that Genesis could not lawfully pay CVSA without a signed PRA or another document that satisfied the Stark Law and Anti-Kickback Statute. It is undisputed that Genesis did not pay CVSA because it would be illegal and doing so would subject it to liability in the absence of any such agreement. The Court finds Genesis' conduct entirely justified given the circumstances.

Secondly, and closely related to the first factor, the Court must consider Genesis' motive in refusing to pay CVSA. Again, Genesis' motive in not paying was to avoid violating the law. The Court appreciates this motive, to say the least. And, courts have held that an act or omission to comply with the law is not "improper" tortious interference. *See Sawhney v. Pioneer Hi-Bred Int'l,* 93 F.3d 1401, 1408-10 (8th Cir. 1996) (holding that defendant's informing government of plaintiff's tax information could not constitute tortious interference with plaintiff's contract with another because defendant's actions were done pursuant to a legal obligation); *see also Eastern Kentucky Resources v. Arnett,* 892 S.W.2d 617, 619, 42 3 Ky. L. Summary 7 (Ky. Ct. App. 1995) (stating that defendants did not improperly tortiously interfere with plaintiff's contract with the county by having county comply with state law to award contract).

Next, the Court considers McDonnell's interest. Certainly, Genesis placed McDonnell in a quandry by not paying CVSA after McDonnell refused to sign the PRA. In so doing, however, Genesis also acted to protect McDonnell's interest. That is, had Genesis paid CVSA in the absence of any signed agreement, CVSA, as McDonnell's employer, could have been found guilty of violating the Stark Law and Anti-Trust Statute. Certainly, this would not have been in McDonnell's best interests.

Fourth, the Court examines the interests Genesis sought to advance by not paying. As described above, Genesis did not pay in order to avoid violating the law. Paying would have potentially resulted in criminal sanctions and/or fines under the Stark Law and Anti-Kickback Statute, and would have jeopardized the future of the heart program at Genesis. Thus, the interests Genesis sought to advance were legitimate.

Fifth, the Court analyzes the social interests involved in protecting Genesis' freedom of action and McDonnell's contractual interests. Our society dictates that Genesis be permitted to act in a lawful manner, or at least in a manner that it perceives to be lawful. Additionally, an orderly society requires that McDonnell be permitted to satisfy the conditions of his contract free from interference from third parties. The Court finds both interests to be strong.

Sixth, the proximity or remoteness of Genesis' conduct to the interference becomes an issue. Here, there was undoubtedly close proximity between Genesis' refusal to pay and interference with McDonnell's performance. Had Genesis paid, the stress and tension most likely would not have resulted.

Finally, the Court will consider the relations between the parties. McDonnell does not assert that there were any problems between himself and Genesis before the PRA issue arose. And, after the PRA issue did arise, Genesis worked in good faith to resolve the problems in a lawful manner.

After considering all of the above factors, the Court determines that Genesis' interference with McDonnell's performance of his CVSA contract, while intentional, was not improper. As such, no genuine issues of material fact remain and Genesis is entitled to judgment as a matter of law with respect to McDonnell's PRA tortious interference claim.

B. ANESTHESIOLOGY

McDonnell asserts that it was Genesis' duty to provide adequate anesthesiology and that Genesis failed to do so, thereby resulting in interference in the form of McDonnell being able to complete fewer procedures. (Pl.'s Mem. in

Opp'n 32-34). Genesis admits that providing anesthesiology was its duty, and also admits that there were problems with providing that service. (ESA 5.1). Genesis further admits that the problems resulted in interference with McDonnell's performance of his CVSA contract. (Smith Dep. Ex. 34). However, Genesis asserts that it worked in good faith to get those problems resolved. (Genesis Mem. in Supp. 19-20; Genesis Reply Mem. 19-20). As such, Genesis asserts that its good faith is a bar to McDonnell's intentional tort claim.

It is clear to the Court that Genesis entered into a contract with Zanesville Anesthesia Physicians ("ZAP") in good faith with the intention of securing anesthesia services for the heart program. The record is devoid of evidence suggesting that Genesis intended that its contract with ZAP would result in interference with McDonnell's performance. Again, any interference would be detrimental to Genesis. Rather, Genesis needed an anesthesiology group to provide services in order to satisfy its ESA with CVSA, to get the heart program started, and to keep the program running. Indeed, McDonnell himself needed anesthesia services in order to perform heart operations under his CVSA contract.

Further, McDonnell does not argue that Genesis had any reason to know with any degree of certainty that ZAP would not adequately perform its obligations under the contract. McDonnell admits that the anesthesia problems began when ZAP breached its contract with Genesis, and that ZAP's breach caused his performance to suffer. (McDonnell Dep. 232). And, once ZAP breached its contract with Genesis, Genesis acted in good faith to secure alternate anesthesiology services. (Hunter Aff. ¶¶ 15-25). McDonnell does not contest that Genesis proceeded in good faith in securing a replacement anesthesiology provider.

Although Genesis' contract with ZAP did interfere with McDonnell's performance, the interference was not intentional. As such, given the totality of the circumstances, and Genesis' undisputed good faith to both secure the ZAP contract and to resolve the issues the breach presented, the Court holds that Genesis did not intentionally interfere with McDonnell's performance of his CVSA contract.[5] *See Singleton,* 2001 U.S. Dist. LEXIS 22415, 2001 WL 1729995, *7 (good faith is a bar to intentional tort claims). Thus, no genuine issue of material fact exists, and Genesis is entitled to judgment as a matter of law on this aspect of McDonnell's tortious interference claim.

C. ANGIOPLASTY

McDonnell's final argument in support of his tortious interference claim is that Genesis improperly caused his performance to be more difficult and burdensome by instituting angioplasty procedures without his consent. (Pl.'s Second Am. Compl. ¶ 79; Pl.'s Resp. in Opp'n 34). In particular, McDonnell states that after Genesis began offering angioplasty procedures, McDonnell spent approximately 90% of the time backing up those procedures. (Pl.'s Resp. in Opp'n 35). As a result, he was not able to perform as many open heart surgeries. Genesis responds that it was not required to obtain McDonnell's consent and that it did not intend for the implementation of the angioplasty procedures to interfere with McDonnell's performance of his CVSA contract. (Genesis Mem. in Supp. 20; Reply 21).

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[5] Because the Court holds that Genesis lacked the requisite intent, the Court need not reach the issue of whether the interference was improper.

The question, then, is whether Genesis intended to improperly interfere with McDonnell's performance under his CVSA contract by implementing angioplasty procedures. McDonnell offers no evidence of any such intent, and that evidence is lacking in the record as well. Nor does McDonnell dispute that Genesis began offering the angioplasty procedures to expand Genesis' heart program.

Furthermore, the ESA between Genesis and CVSA permitted Genesis to initiate the program. In initiating the angioplasty program, Genesis could not have known with any degree of certainty that the new procedures would interfere with McDonnell's performance of his CVSA contract because the ESA explicitly imposed a duty on CVSA to provide backup surgical services and coverage for angioplasties. (Genesis Mem. Summ. J. Ex. V). Whether that coverage came from McDonnell or from another physician that CVSA found was not Genesis' responsibility. As a result, any complaint McDonnell had about the effects of the angioplasty program should have been directed at CVSA, as McDonnell's employer.

The Court finds McDonnell's "consent" argument to be without merit. (Pl.'s Second Am. Compl. ¶ 80). Specifically, McDonnell argues that Genesis acted improperly by instituting the new procedures without his consent. McDonnell himself admitted that he was not an employee of Genesis, and that he did not have any "veto" power over whether Genesis began offering the angioplasty procedures.

(McDonnell Dep. 233-34).[6] Thus, McDonnell's own admissions thwart his argument.

As such, the totality of the circumstances indicate that Genesis did not intentionally interfere with McDonnell's performance of his CVSA contract by instituting the angioplasty program. Consequently, no genuine issue of material fact exists and Genesis is entitled to summary judgment as a matter of law on McDonnell's angioplasty tortious interference claim.

III. LOST PROFITS

McDonnell also asserts that Genesis tortiously interfered with McDonnell's performance under the CVSA contract by failing to provide adequate office space and other support personnel. (Pl.'s Second Am. Compl. ¶ 79). The Court noted in footnote 5, *supra,* that those claims are still intact. Thus, the possibility remains that McDonnell could be successful on those claims. With that possibility necessarily comes the possibility of McDonnell's recovering lost profits. As a result, McDonnell's damages claim for lost profits remains viable at this time.

CONCLUSION

For the reasons stated above, Genesis' Motion for Summary Judgment is **GRANTED.** McDonnell's fraud claims against Genesis are dismissed with prejudice. Likewise, McDonnell's tortious interference claims against

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[6] Because the Court holds that Genesis lacked intent, the Court need not reach the issue of whether the alleged interference was improper.

Genesis involving McDonnell's PRA, anesthesiology and angioplasty arguments are dismissed with prejudice. However, McDonnell's claims for tortious interference as a result of Genesis' alleged failure to provide adequate office space and other support personnel remain. (Pl.'s Second Am. Compl. ¶ 79; *See also* footnote 5, *supra*).

IT IS SO ORDERED.

/s/ Gregory L. Frost
GREGORY L. FROST
UNITED STATES DISTRICT JUDGE

APPENDIX F

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. C2-03-0079

[Filed July 28, 2004]

BRYAN E. McDONNELL, Plaintiff,	)
v.	)
CARDIOTHORACIC & VASCULAR SURGICAL ASSOCIATES, INC., et al., Defendants.	)

GREGORY L. FROST,
UNITED STATES DISTRICT JUDGE
Magistrate Judge Kemp

OPINION AND ORDER

This matter is before the Court on Plaintiff Brian McDonnell's ("McDonnell") Motion for Partial Summary Judgment (Doc. ## 101 & 106); Defendant Genesis Health Care's ("Genesis") Memorandum in Opposition (Doc. ## 143 & 144); Defendant Cardiothoracic & Vascular Surgical

Associates, Inc.'s ("CVSA") and Defendant Cardiothoracic & Vascular Surgical Specialists, Inc.'s ("CVSS") Memorandum in Opposition (Doc. # 145), and McDonnell's Reply Memorandum in Support (Doc. # 146). For the following reasons, the Court **DENIES** McDonnell's motion.

BACKGROUND

McDonnell is a board-certified general and cardiothoracic surgeon. (Pl.'s Second Am. Compl. ¶ 1). Genesis is an Ohio nonprofit corporation engaged in providing health care services. *Id.* at ¶ 2. It owns and operates the Zanesville Hospital and Bethesda Hospital in Zanesville. *Id.* CVSA is a professional corporation that provides cardiothoracic and vascular surgical services at Ohio hospitals. *Id.* at ¶ 3. CVSS took over CVSA's business in January 2003. *Id.* at ¶ 5. As such, CVSS is the successor in interest to CVSA.[1] *Id.*

Genesis wanted to establish an open-heart surgery program at the Zanesville Hospital and contacted CVSA to discuss the possibility of CVSA becoming the exclusive provider of open-heart surgery services at that facility. CVSA was interested, but did not want to incur any financial losses. As such, Genesis and CVSA discussed the possibility of Genesis financially supporting CVSA by compensating CVSA for its operating expenses at the Zanesville location in order to prevent any loss. However, in order for the support to be legal under federal health care statutes, Genesis and CVSA agreed that a Physician's Recruitment Agreement ("PRA") would be needed. (Pl.'s Memo. Support 6). Genesis' attorney drafted a preliminary PRA and forwarded it to CVSA's

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[1] The Court will use CVSA to refer to CVSA and CVSS.

attorney in March 2000. *Id.* at 7. The parties to the PRA would be Genesis and the selected physician. *Id.*

Subsequently, Genesis signed an Exclusive Services Agreement for Cardiothoracic Surgery Program ("ESA") with CVSA in August 2000. *Id.* at ¶ 12. Pursuant to that agreement, Genesis agreed that CVSA would be the exclusive provider of certain surgical procedures at the Zanesville Hospital, including open-heart surgery. (ESA at 1.1). Accordingly, CVSA agreed to provide a full-time cardiothoracic surgeon in order to establish an open heart surgery program at the Zanesville Hospital. *Id.* at 1.2. However, the surgeon was to be an employee of CVSA, and nothing in the ESA "shall be construed to create between Genesis and CVSA or Genesis and any employees or agents of CVSA an employer-employee relationship...." *Id.* at 11. Additionally, CVSA agreed to provide coverage for the selected physician when the doctor was on vacation or otherwise unavailable. *Id.* at 1.2. In return, Genesis agreed to hire and pay necessary support personnel and obtain required equipment. *Id.* at 5.1, 5.2. CVSA agreed to bill patients directly for services rendered, while Genesis would separately bill the patients for facility charges. *Id.* at 7.1. McDonnell was not a party to this agreement. (Pl.'s Second Am. Compl. ¶ 12).

McDonnell visited Genesis as a candidate for the physician position in May 2000. (Pl.'s Memo. in Support p.7). Genesis did not tell McDonnell about the PRA during his visit. *Id.* at 7. McDonnell signed an Employment Agreement ("Employment Agreement") with CVSA on September 19, 2000. (Pl.'s Am. Compl. at 9). At the time McDonnell signed the Employment Agreement, he was not aware of the ESA. *Id.* at ¶ 12. The Employment Agreement had a term of three years and provided that either party could

terminate the Employment Agreement at any time with or without cause with notice. (Employment Agreement at ¶ 6). Additionally, the agreement permitted McDonnell to take four weeks paid vacation during his first year, and six weeks during his second and third years. *Id.* at ¶ 8. The Employment Agreement also stated that McDonnell would have the right to purchase CVSA stock if "the employment relationship proves to be mutually satisfactory at the end of the initial 36 month term of this agreement." *Id.* at ¶ 13. Finally, the agreement stated that "This document contains the entire agreement between the parties and supersedes any prior understandings or agreements between them and the subject matter." *Id.* at ¶ 17.

McDonnell and his family subsequently relocated from Maryland to Zanesville and performed his first operation in late October 2000. (Pl.'s Second Am. Compl. at ¶ 11). In early February 2001, Genesis and CVSA delivered the PRA to Dr. McDonnell for signature. *Id.* at ¶ 19. The PRA was prepared by either CVSA, Genesis, or both parties together. *Id.* The PRA contained ancillary agreements, including a Security Agreement; a Consent to Assignment; an Agreement of Assignment (collectively the "Ancillary Agreements"); and a Cognovit Promissory Note. *Id.* The parties to the proposed Physician Recruitment Agreement were Genesis and McDonnell. *Id.* at ¶ 20.

Among other things, the Physician Recruitment Agreement, by its name, purported to "recruit" McDonnell to provide cardiothoracic surgery services at the Zanesville Hospital and a guarantee that Genesis would provide him a minimum annual compensation for a 3-year period. (Pl.'s Second Am. Compl. ¶ 20.) The Cognovit Note, in the amount of $960,000.00, would have required McDonnell to repay all or a portion of the annual compensation payments provided

for in the Physician Recruitment Agreement if he were to leave the Zanesville area before the expiration of seven years. *Id.* at ¶ 21. The Consent to Assignment Agreement, which Genesis, Dr. McDonnell, and CVSA were all to be parties to, permitted Genesis to pay directly to CVSA the payments that it would otherwise be making to Dr. McDonnell under the Physician Recruitment Agreement. *Id.* The Security Agreement, entered into by CVSA and Genesis, gave Genesis the right to collect, among other things, CVSA's and Dr. McDonnell's accounts receivable. *Id.*

McDonnell declined to sign the Physician Recruitment Agreement, Cognovit Promissory Note, and Ancillary Agreements. *Id.* at ¶ 22. CVSA and Genesis then demanded that McDonnell sign the documents. *Id.* at ¶ 27. When McDonnell refused, Genesis, CVSA and McDonell attempted to reach a satisfactory agreement but were unable to do so. McDonnell then submitted a resignation letter on January 8, 2002. *Id.* at ¶ 58.

Thereafter, McDonnell filed this suit alleging that CVSA: (1) committed fraud; (2) wrongfully (constructively) discharged McDonnell in violation of public policy, and (3) breached the Employment Agreement. McDonnell also asserted that Genesis had committed fraud and had tortiously interfered with McDonnell's employment relationship with CVSA.

McDonnell's Motion for Partial Summary Judgment is now before the Court. McDonnell asks the Court to hold that if the PRA had been executed, it would not have satisfied an exception to the Stark Law ("Stark"), 42 U.S.C. § 1395nn (a), or a safe-harbor provision in the Anti-Kickback Statute ("Anti-Kickback"), 42 U.S.C. § 1320a-7b(b). (Pl.'s Mem. in Supp. 1). McDonnell also requests that the Court to rule that

payments made by Genesis to CVSA after McDonnell left violated the Stark Law and the Anti-Kickback Statute. (Pl.'s Reply Mem. 32). Genesis, CVSA and CVSS each filed a response in opposition.

STANDARD OF REVIEW

The procedure for considering whether summary judgment is appropriate is set forth in Federal Rule of Civil Procedure 56(c), which provides:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is not genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. The evidence must be viewed in the light most favorable to the nonmoving party.

Adickes v. Kress & Co., 398 U.S. 144, 158-159, 90 S. Ct. 1598, 26 L. Ed. 2d 142 (1970). Summary judgment will not lie if the dispute about material fact is genuine; "that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). Summary Judgment is appropriate however, if the opposing party fails to make a showing sufficient to establish the existence of an element essential to that party's case and on which that party will bear the burden of proof trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986); *see also Matsuchita Electronic Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986).

Additionally, in responding to a summary judgment motion, the nonmoving party "cannot rely on the hope that the trier of fact will disbelieve the movant's denial of a disputed fact, but must 'present affirmative evidence in order to defeat a properly supported motion for summary judgment'" *Id.* (quoting *Liberty Lobby,* 477 U.S. at 257). The non moving party must adduce more than a mere scintilla of evidence in order to overcome the summary judgment motion. *Id.* It is not sufficient for the nonmoving party to merely "'show that there is some metaphysical doubt as to the material facts.'" *Id.* (quoting *Matsushita,* 475 U.S. at 586). Moreover, "the trial court no longer has the duty to search the entire record to establish that it is bereft of a genuine issue of material fact." *Id.* That is, the nonmoving party has an affirmative duty to direct the court's attention to those specific portions of the record upon which it seeks to rely to create a genuine issue of material fact.

DISCUSSION

McDonnell requests that the Court grant his Motion for Partial Summary Judgment on two issues. The first is that if the PRA had been executed, it would have failed to satisfy either a safe harbor provision in the Anti-Kickback Statute or an exception to the Stark Law. The second is that payments made by Genesis to CVSA pursuant to agreements between them that were made after McDonnell left were illegal under those same statutes.

As a threshold issue, Genesis and CVSA assert that there is no private right of action under either the Stark Law or Anti-Kickback Statute. (Genesis' Mem. in Opp'n 2; CVSA Mem. in Opp'n 3 n.1, p. 18). Both defendants argue that the Anti-Kickback Statute imposes criminal sanctions and that the Stark Law's provisions are enforced by the Office of the

Inspector General. (Genesis Mem. in Opp'n 2-3; CVSA Mem. in Opp'n p.3 n.1, p. 18). As such, Genesis and CVSA contend that McDonnell is attempting to "'back door' a claim that he is otherwise precluded from asserting." (Genesis Mem. in Opp'n 3; see CVSA Memo. in Opp'n 3 n.1, p. 18).

Another court recently addressed a similar argument in *Robert Wood Johnson University Hosp., Inc., et al., v. Tommy G. Thompson, Sec'y of Health & Human Services, et al.*, 2004 U.S. Dist. LEXIS 8498 (D. NJ 2004). Instructively, the Court noted:

> Defendants repeatedly assert that Plaintiffs cannot 'manufacture subject-matter jurisdiction' under the Anti-Kickback Statute or the [Civil Monetary Penalties Statute] as both statutes preclude a private right of action for injunctive relief. Plaintiffs are not seeking to individually enforce the penalties provided through these criminal and civil statutes, however. For example, the RWJ Plaintiffs are not seeking to enforce criminal sanctions or to levy fines against the Participating Hospitals pursuant to the Anti-Kickback Statute or the [Civil Monetary Penalties Statute], respectively, if those hospitals make Medicare-related payments to induce physicians to reduce services as contemplated by the Demonstration Project. Such enforcement of those laws was Congressionally delegated not to private parties like Plaintiffs but to the Executive Branch. Nevertheless, the facial violation of these statutes, through the implementation of the Demonstration Project, is certainly reviewable by this Court because it has already determined that there are independent grounds for subject matter jurisdiction and Plaintiffs' standing to sue.

Id. at * 18 n.8 (citations to parties' briefs omitted). Thus, because the Johnson plaintiff's already had: (1) given the court independent grounds for subject matter jurisdiction; and (2) were not seeking to enforce criminal sanctions or levy fines against the defendants, the court held it had the authority to facially review whether the defendants had violated the statutes.

The Court will apply the *Johnson* logic here for three reasons. First, 28 U.S.C. § 1332(a) grants this Court an independent ground for jurisdiction. Second, McDonnell is not seeking to enforce criminal sanctions or to levy a fine against Genesis and/or CVSA. Rather, McDonnell seeks to establish that the PRA failed to satisfy the safe harbor provisions or exceptions as a way of establishing his fraud claims against Genesis and CVSA. Thus, the Court holds that McDonnell is not attempting to assert a claim under the Anti-Kickback Statute or the Stark Law. As a result, under *Johnson,* the Court determines it may review whether the PRA would have facially satisfied the safe harbor provisions or exceptions because the issue relates to McDonnell's fraud claims.

As a means of analysis, the Court will first address the PRA issue and will then turn to analyzing the payment issue.

A. PRA

McDonnell asserts that many of Genesis' open-heart surgery patients were covered by Medicare. (Pl.'s Mem. in Supp. 9). As such, Genesis and CVSA were subject to the Anti-Kickback Statute and the Stark Law. A PRA, if it satisfies certain conditions, is a safe harbor under the Anti-Kickback Statute and an exception to the Stark Law. Consequently, McDonnell argues, and Genesis and CVSA do

not dispute, that without a signed PRA, Genesis could not lawfully pay for CVSA's operating expenses under the Anti-Kickback Statute or Stark Law. *Id.* at 2, 9. McDonnell asserts, however, that the PRA was a cover to allow Genesis to pay for CVSA's operating expenses in return for CVSA's referring patients to Zanesville Hospital. (Pl.'s Mem. in Supp. 5, 6, 10).[2]

McDonnell received the PRA in February 2001. (Pl.'s Second Am. Compl. ¶ 21). CVSA's counsel told McDonnell that McDonnell needed to sign the PRA in order to prevent payments that Genesis made to CVSA for the operating expenses from being illegal under the Anti-Kickback Statute and the Stark Law. *Id.* at ¶ 24.

Genesis and CVSA assert that whether the PRA fell into a Stark exception or satisfied the Anti-Kickback's safe harbor requirements is irrelevant. (Genesis' Mem. in Opp'n 143; CVSA's Mem. in Opp'n 2). McDonnell responds that the issue is relevant because the PRA's legality "was the pretext upon which both Genesis and CVSA relied in concocting the PRA in the first place and then insisting that McDonnell sign it." (Pl.'s Reply Mem. 1). For the sake of thoroughness, the Court will examine the issue.

1. STARK LAW

The Stark Law is designed to prevent abusive self-referrals. *United States ex rel Perales v. St. Margaret's*

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[2] The Court notes that the quote McDonnell uses in support of this argument fails to do so. The quote only refers to an advertisement that was designed to attract people to the Zanesville hospital for heart services. (Sieber Dep. at 81-83).

Hosp., 243 F. Supp. 2d 843, 848 (C.D. IL 2003). The Office of the Inspector General enforces the Stark Law's provisions. 42 C.F.R. § 1003.102(a)-(b). The relevant provision prohibits doctors from ordering "designated health services" for Medicare patients from entities with which the physician, or members of the physician's family, has a "financial relationship." 42 U.S.C. § 1395nn(a)(1); *Feldstein v. Nash Comm. Health Servs. Inc.*, 51 F. Supp. 2d 673, 678 n.8 (E.D. N.C. 1999).[3] A designated health service includes hospital in-patient and out-patient services. 42 U.S.C. § 1395nn(h)(6)(K).

Under the Stark Law, a doctor is prohibited from referring Medicare or Medicaid patients for inpatient or outpatient services to any hospital with which the physician (or an immediate family member) has financial relationship, unless the relationship falls into one of the statute's enumerated exceptions. 42 U.S.C. § 1395nn. The exception at issue provides:

> (e) Exceptions relating to other compensation arrangements. The following shall *not* be considered to be a compensation arrangement described in subsection (a)(2)(B):
>
> (5) *Physician recruitment.* In the case of remuneration which is provided by a hospital to a physician to induce the physician to relocate to the geographic area served by the hospital in order to be a member of the medical staff of the hospital, if--

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[3] That practice is commonly referred to as "self-referral." *Peterson v. Community General Hosp.*, 2003 U.S. Dist. LEXIS 1783, * 2 (D. IL 2003).

> (A) the physician is not required to refer patients to the hospital,
> (B) the amount of the remuneration under the arrangement is not determined in a manner that takes into account (directly or indirectly) the volume or value of any referrals by the referring physician, and
> (C) the arrangement meets such other requirements as the Secretary may impose by regulation as needed to protect against program or patient abuse.

42 USCS § 1395nn(e)(5) (emphasis added).

Pursuant to the "physician recruitment" exception, a physician recruitment contract is not a prohibited compensation agreement under the Stark Law. The physician recruitment exception is applicable so long as the: (1) arrangement and its terms are in writing and signed by both parties; (2) arrangement is not conditioned on the physician's referral of patients to the hospital; (3) hospital does not determine (directly or indirectly) the amount or value of the remuneration to the physician based on the volume or value of any referrals the physician generates for the hospital, and (4) physician is not precluded from establishing staff privileges at another hospital or referring business to another entity. 42 CFR 411.357.

First, it is clear from the record that the PRA was in writing. (Pl.'s Original Compl. Ex. A). While a Genesis representative signed the PRA, McDonnell did not. *Id.* Genesis sent a draft PRA to CVSA in April 2000, believing that CVSA, as McDonnell's employer, would present the PRA to McDonnell for signature before McDonnell began working. (Genesis' Mem. in Opp'n 2 n.2, p. 10). McDonnell does not argue that the miscommunication did not occur. The PRA was presented to McDonnell for his signature in

February 2001. However, McDonnell did not sign it. Second, after reviewing the PRA, it does not appear to the Court that the proposed PRA was conditioned on the physician's referral of patients to the hospital. Nor does McDonnell claim that the PRA contained such a condition. Third, under the proposed PRA, Genesis would not determine (directly or indirectly) the amount or value of the remuneration to McDonnell based on the volume or value of any referrals McDonnell generated for Genesis. Again, McDonnell does not claim that the PRA so provided. Fourth, the Court's review of the proposed PRA revealed that McDonnell was not precluded from establishing staff privileges at another hospital or referring business to another entity. Finally, McDonnell does not dispute that the PRA did not preclude him from so doing. Thus, if McDonnell had signed the PRA, the PRA appears to have satisfied the requirements for the physician recruitment exception under the Stark Law.

However, McDonnell argues that the Stark exception was not satisfied because the PRA itself played no part whatsoever in McDonnell's decision to relocate to Zanesville. (Pl.'s Mem. in Supp. 5). The Court finds this argument unavailing. As stated above, Genesis believed the agreement would be presented to McDonnell before he began at Zanesville. And, under the exception's plain terms, the inducement at issue is the remuneration, not the agreement itself. Specifically, the exception provides that "In the case of remuneration, which is provided by a hospital to induce the physician to relocate ...." Clearly, it is the remuneration, not the PRA itself, that is the inducement. And, under the PRA, Genesis guaranteed McDonnell's salary. As such, the Court holds that had McDonnell signed the PRA, the PRA would have satisfied the requirements for the physician recruitment exception under the Stark Law.

2. ANTI-KICKBACK STATUTE

The Anti-Kickback Statute is a criminal statute that generally prohibits the receipt or payment of remuneration in return for referring patients for certain health care services. 42 U.S.C.S. § 1320a-7b; *Feldstein v. Nash Community Health Services, Inc.*, 51 F. Supp. 2d 673, 687 (E.D. NC 1999) (*quoting* 60 Fed. Reg. 41961). The statute makes it a felony to knowingly and willfully offer, pay, receive or solicit any remuneration to induce referrals of services reimbursable by federal health care programs. Federal health care programs include Medicare. (42 U.S.C.S. § 1320a-7b(b)). Thus, the Anti-Kickback Statute seeks "particularly to criminalize various payment and business practices intended to induce patient referrals, which contribute to such frauds." *Johnson,* 2004 U.S. Dist. LEXIS 8498 at * 22.

Like the Stark Law that has exceptions, the Anti-Trust Statute has safe-harbors that "have been designed to set forth payment practices and business arrangements that will be protected from criminal prosecution and civil sanctions." *Feldstein,* 51 F. Supp. 2d 673 at 687 (quoting 60 Fed. Reg. 41961). The safe harbor at issue here states:

> (n) Practitioner recruitment. As used in section 1128B of the Act, 'remuneration' does not include any payment or exchange of anything of value by an entity in order to induce a practitioner who has been practicing within his or her current specialty for less than 1 year to locate, or to induce any other practitioner to relocate, his or her primary place of practice into a HPSA for his or her specialty area, as defined in Departmental regulations, that is served by the entity, as long as all of the following nine standards are met ...

McDonnell argues that the PRA fails to satisfy the physician recruitment exception because the area that Zanesville served was not a Health Professional Shortage Area ("HPSA").[4] A HPSA is a geographic area that has been

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[4] McDonnell's argument regarding the Health Professional Shortage Area is dispositive of the rest. As such, his contentions that the PRA fails to satisfy the second and ninth requirements need not be addressed. (Pl.'s Memo. in Support 13-16). For the sake of thoroughness, the nine exceptions are:

> (1) The arrangement is set forth in a written agreement signed by the parties that specifies the benefits provided by the entity, the terms under which the benefits are to be provided, and the obligations of each party.
>
> (2) If a practitioner is leaving an established practice, at least 75 percent of the revenues of the new practice must be generated from new patients not previously seen by the practitioner at his or her former practice.
>
> (3) The benefits are provided by the entity for a period not in excess of 3 years, and the terms of the agreement are not renegotiated during this 3-year period in any substantial aspect; provided, however, that if the HPSA to which the practitioner was recruited ceases to be a HPSA during the term of the written agreement, the payments made under the written agreement will continue to satisfy this paragraph for the duration of the written agreement (not to exceed 3 years).
>
> (4) There is no requirement that the practitioner make referrals to, be in a position to make or influence referrals to, or otherwise generate business for the entity as a condition for receiving the benefits; provided, however, that for purposes of this paragraph, the entity may require as a condition for receiving benefits that the practitioner

designated by the Secretary for Health and Human Services as having a shortage of physicians which is not reasonably

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maintain staff privileges at the entity.

(5) The practitioner is not restricted from establishing staff privileges at, referring any service to, or otherwise generating any business for any other entity of his or her choosing.

(6) The amount or value of the benefits provided by the entity may not vary (or be adjusted or renegotiated) in any manner based on the volume or value of any expected referrals to or business otherwise generated for the entity by the practitioner for which payment may be made in whole or in part under Medicare, Medicaid or any other Federal health care programs.

(7) The practitioner agrees to treat patients receiving medical benefits or assistance under any Federal health care program in a nondiscriminatory manner.

(8) At least 75 percent of the revenues of the new practice must be generated from patients residing in a HPSA or a Medically Underserved Area (MUA) or who are part of a Medically Underserved Population (MUP), all as defined in paragraph (a) of this section.

(9) The payment or exchange of anything of value may not directly or indirectly benefit any person (other than the practitioner being recruited) or entity in a position to make or influence referrals to the entity providing the recruitment payments or benefits of items or services payable by a Federal health care program.

42 CFR 1001.952n.

accessible to an adequately served area. *See* 42 U.S.C.S. § 295k(e).

Genesis concedes that the PRA did not satisfy the safe-harbor requirements. (Genesis Mem. in Opp'n 13). CVSA argues that the PRA satisfied every requirement except the one dealing with the Health Professional Shortage Area. (CVSA Mem. in Opp'n 5, 8). CVSA thus argues that substantial compliance is enough to qualify for the safe harbor. *Id.* at 8. The issue thus becomes whether the PRA must satisfy each and every requirement in order to qualify for the safe-harbor exception.

The answer to that question is yes. The exception itself provides it applies "as long as *all* of the following nine standards are met...." (Emphasis added). Further, the Office of Inspector General's Advisory Opinion No. 01-04 states "safe-harbor protection is afforded only to those arrangement that precisely meet all of the conditions set froth in the safe harbor." (Advisory Opinion No. 01-04 at 5) (emphasis added). Although administrative advisory opinions do not have the force of law, they are "entitled to respect ... only to the extent that those interpretations have the power to persuade." *Christensen v. Harris County,* 529 U.S. 576, 587, 120 S. Ct. 1655, 146 L. Ed. 2d 621 (2000). Given the exception's plain language, the Court finds the advisory opinion to be quite persuasive. As such, the Court holds that the PRA, had it been signed, would not have qualified for the physician recruitment exception's requirements.

However, both Genesis and CVSA correctly point out that simply because the PRA failed to qualify for the safe harbor does not mean that the proposed PRA would have been illegal under the Anti-Kickback Statute. (Genesis Mem. in Opp'n 13; CVSA Mem. in Opp'n 4). "The failure to fall within a safe-harbor does not necessarily mean that the conduct/relationship

is prohibited by the Anti-Kickback Statute." *Feldstein,* 51 F. Supp. 2d 673, 687 (quoting 60 Fed. Reg. 41961 (August 1995)). Moreover, the Inspector General has noted that "Safe Harbors do not define the scope of legal activities under the anti-kickback statute." *United States v. St. Margaret's Hosp.,* 243 F. Supp. 2d 843, 863 (C.D. IL 2003) (quoting 60 Fed. Reg. 63251 (Nov. 1999)). Additionally,

> The anti-kickback statute ... establishes an intent-based criminal prohibition with optional statutory and regulatory 'safe harbors' that do not purport to define the full range of lawful activity. Rather, the safe harbors provide a means of assuring that payment practices are not illegal. Payment practices that do not fully comply with a safe harbor may still be lawful if no purpose of the payment practice is to induce referrals of Federal health care program business.

United States v. Shaw, 106 F. Supp. 2d 103, 114-115 (D. MA 2000) (64 Fed. Reg. 63,518 - 519 (1999)). Further,

> This (safe harbor) regulation does not expand the scope of activities that the statute prohibits. The statute itself describes the scope of illegal activities. The legality of a particular business arrangement must be determined by comparing the particular facts to the proscriptions of the statute.

64 FR 63521 (1999).

Arrangements that do not qualify for the safe harbor must be evaluated on a case-by-case basis. 64 Fed. Reg. 63,545 (1999). The Anti-Kickback Statute makes it a felony to knowingly and willfully offer, pay, receive or solicit any remuneration to induce referrals of services reimbursable by

federal health care programs. 42 U.S.C. § 1320a-7b(b). There are two schools of thought as to what constitutes "knowingly and willfully" for purposes of determining whether the Anti-Kickback Statute is violated. The Ninth Circuit defines "knowingly and willfully" as (1) knowing that the Anti-Trust Statute prohibits offering or paying remuneration to induce referrals, and (2) engaging in prohibited conduct with the specific intent to disobey the law. *Hanlester Network v. Shalala,* 51 F.3d 1390, 1400 (9th Cir. 1995). In contrast, this Court held that a violation of the statute may be shown without establishing that the defendant(s) acted "with knowledge of illegality." *United States v. Neufeld,* 908 F. Supp. 491, 497 (1995) (Smith, J). Rather, it is sufficient if the evidence shows that the defendant(s) had a "purpose to commit a wrongful act." *Id.* Under either theory, however, McDonnell is not entitled to summary judgment.

Regarding the first *Shalala* element, neither Genesis nor CVSA dispute that they knew it would be illegal for Genesis to provide remuneration to CVSA for operating expenses in return for referrals. Thus, McDonnell must provide evidence that Genesis and CVSA had the specific intent to disobey the law. That evidence is lacking in the record.

Three attorneys - one for Genesis, one for CVSA, and one for McDonnell - worked on drafting and obtaining a PRA signed in order to legalize Genesis' discussions with CVSA regarding the possibility of Genesis compensating CVSA's office expenses. Numerous drafts were exchanged. McDonnell's attorney was David Grauer. Attorney Grauer testified in his deposition that he believed that both Genesis' counsel and CVSA's counsel acted ethically and in good faith in attempting to finalize a draft of the PRA that would satisfy

the Anti-Kickback Statute. (Grauer Dep. at 45-47). Specifically, Grauer testified that:

> Q: And I take it in the course of your discussions with CVSA's counsel as well as Genesis' Counsel, it was your impression that they were at all times proceeding in good faith?
> A: Yes.
> Q. And they were trying to identify a legal resolution for an issue that existed?
> A. They were trying to make the best out of a bad situation.
> Q. And in trying to make the best out of a bad situation, as you described it, I take it that you believe they were trying to do so in a lawful manner?
> A. Yes.

(Grauer Dep. 45-47). Additionally, Genesis' attorney, Karen Smith, worked on finalizing the PRA with attorney Grauer. She stated in her affidavit that she believed it comported with the Anti-Kickback Statute and the Stark Law. (Smith Aff. ¶ 3).

From this, it is clear to the Court that Genesis and CVSA proceeded in good faith regarding the PRA and therefore lacked the specific intent to disobey the Anti-Kickback statute. McDonnell has therefore failed to establish that Genesis and CVSA violated the Anti-Kickback statute under the *Shalala* standard.

Additionally, McDonnell cannot establish the *Neufeld* requirement that Genesis and CVSA had a "purpose to commit a wrongful act." *Neufeld,* 908 F. Supp. at 497. Specifically, McDonnell asserts that one purpose of the PRA was to induce CVSA to make referrals to Genesis. However,

McDonnell offers nothing more than mere speculation to support this contention.

It is clear from the record that Genesis wanted to start a heart program in Zanesville and needed a doctor to do it. To that end, Genesis met with CVSA to determine if CVSA would be interested in becoming the exclusive services provider for the new program. While CVSA expressed interest, it also expressed concerns about the potential financial losses associated with starting a new practice. Consequently, Genesis agreed to the cover reasonable operating expenses of the new practice and CVSA agreed to provide Genesis with a doctor. (Pl.'s Orig. Compl. Ex. A pp. 4-6). Genesis and CVSA decided a PRA was needed for the financial support to be necessary. In fact, the PRA provided that Genesis would pay McDonnell's "reasonable and necessary office expenses." (Pl.'s Orig. Compl. Ex. A pp. 4-6). In the absence of any evidence to the contrary, the Court is convinced that neither Genesis nor CVSA had the purpose to commit a wrongful act through the execution of the PRA. As such, McDonnell failed to establish that Genesis or CVSA would have violated the Anti-Kickback statute under *Neufeld.*

Based upon the foregoing, McDonnell's Motion for Partial Summary Judgment that the PRA violated the Anti-Trust Statute is **DENIED.**

B. LEGALITY OF PAYMENTS

Next, McDonnell asks the Court to find that payments Genesis made to CVSA in December 2001 pursuant to a settlement agreement between the parties violated the Stark Act and the Anti-Trust Statute. Specifically, McDonnell claims that Genesis paid CVSA $340,772 for "losses in connection with the open-heart surgery program" for the year

2001. (Pl.'s Memo. in Support 8). Additionally, McDonnell wants the Court to hold that payments Genesis made to CVSS after McDonnell left pursuant to a services agreement also violated the Stark Law and the Anti-Trust Statute. McDonnell asserts that those payments support his argument that the PRA was just a cover for getting CVSA to refer patients to Genesis. Genesis and CVSA respond that the PRA was not a cover and that the payment issue is irrelevant.

The Court finds the relevance argument of Genesis and CVSA persuasive for three reasons. First, neither the settlement agreement nor the services agreement involved McDonnell. Second, most of the payments made under the agreements occurred after McDonnell left Zanesville. Third, as the Court held above, Genesis and CVSS lacked the necessary intent or purpose to violate the Anti-Kickback Statute, and the PRA satisfied the physician recruitment exception under the Stark Law. As such, any argument McDonnell had about the payments supporting his contention that the PRA was merely a cover is not well-taken. And, simply because the Court reviewed whether the PRA would have facially satisfied an exception to the Stark Law and a safe-harbor to the Anti-Trust Statute does not mean that the Court must repeat that analysis for signed, executed agreements that did not involve McDonnell and almost entirely occurred after he left. In essence, McDonnell asks this Court to assign criminal liability to Genesis and CVSS in a civil proceeding based on two agreements to which McDonnell was not even a party. Such a ruling would raise significant constitutional issues, to say the least. As a result, the Court declines McDonnell's invitation to determine whether the payments violated the Anti-Kickback Statute and the Stark Law.

CONCLUSION

For the reasons stated above, McDonnell's Motion for Partial Summary Judgment is **DENIED** in all respects.

IT IS SO ORDERED.

/s/ Gregory L. Frost
GREGORY L. FROST
UNITED STATES DISTRICT JUDGE

APPENDIX G

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 04-4151

[Filed February 7, 2005]

BRYAN E. MCDONNELL, Plaintiff-Appellant,	)
v.	)
CARDIOTHORACIC & VASCULAR SURGICAL ASSOCIATES, INC.; GENESIS HEALTHCARE SYSTEM: CARDIOTHORACIC AND VASCULAR SURGICAL SPECIALISTS, INC., Defendants-Appellees.	)

Before: SILER, COLE, and CLAY, Circuit Judges

ORDER

The plaintiff appeals the judgment for the defendants in this diversity contract dispute. The defendants now move to dismiss the appeal because, at the time the appeal was filed, the judgment was not set forth on a separate document. The plaintiff opposes the motions.

The district court entered orders granting partial summary judgment for the defendants on July 30, 2004, and August 3, 2004. On August 9, 2004, a stipulated notice of dismissal was filed in the district court, dismissing without prejudice, all of the remaining claims by the plaintiff against the defendants. The plaintiff's notice of appeal was filed on August 30, 2004. In general, Fed. R. Civ. P. 58(a)(1) requires that every judgment and amended judgment be set forth on a separate document. At the time the plaintiff's appeal was filed, the district court's judgment was not set forth on a separate document. For that reason, the defendants argue that dismissal is warranted. We do not agree.

This court has jurisdiction in appeals from final orders and decisions of the district court. 28 U.S.C. § 1291. A decision is final if it disposes of all claims and parties on the merits and leaves nothing for the district court to do but execute the judgment. *Catlin v. United States,* 324 U.S. 229, 233 (1945). When the stipulated notice of dismissal was filed in the district court on August 9, 2004, the judgment for the defendants became final. *See Hicks v. NLO, Inc.,* 825 F.2d 118. 120 (6th Cir. 1987). The plaintiff's August 30 appeal was filed within 30 days of that date and was timely for purposes of conferring appellate jurisdiction. *See* Fed. R. App. P. 4(a)(1)(A). The validity of the plaintiff's appeal was not affected by the lack of a separate judgment entry. Rule 4(a) expressly states:

> A failure to set forth a judgment or order on a separate document when required by Federal Rule of Civil Procedure 58(a)(1) does not affect the validity of an appeal from that judgment or order.

Fed. R. App. P. 4(a)(7)(B).

The defendants' motions to dismiss are **DENIED**.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Clerk

APPENDIX H

STATUTORY AND REGULATORY PROVISIONS INVOLVED

TITLE 42. THE PUBLIC HEALTH AND WELFARE CHAPTER 7. SOCIAL SECURITY ACT TITLE XI. GENERAL PROVISIONS, PEER REVIEW, AND ADMINISTRATIVE SIMPLIFICATION PART A. GENERAL PROVISIONS

42 U.S.C. § 1320a-7b(b)(1)-(2)

§ 1320a-7b. Criminal penalties for acts involving Federal health care programs

(b) Illegal remunerations.

(1) Whoever knowingly and willfully solicits or receives any remuneration (including any kickback, bribe, or rebate) directly or indirectly, overtly or covertly, in cash or in kind—

(A) in return for referring an individual to a person for the furnishing or arranging for the furnishing of any item or service for which payment may be made in whole or in part under a Federal health care program, or

(B) in return for purchasing, leasing, ordering, or arranging for or recommending purchasing, leasing, or ordering any good, facility, service, or item for which

payment may be made in whole or in part under a Federal health care program,

shall be guilty of a felony and upon conviction thereof, shall be fined not more than $25,000 or imprisoned for not more than five years, or both.

(2) Whoever knowingly and willfully offers or pays any remuneration (including any kickback, bribe, or rebate) directly or indirectly, overtly or covertly, in cash or in kind to any person to induce such person—

(A) to refer an individual to a person for the furnishing or arranging for the furnishing of any item or service for which payment may be made in whole or in part under a Federal health care program, or

(B) to purchase, lease, order, or arrange for or recommend purchasing, leasing, or ordering any good, facility, service, or item for which payment may be made in whole or in part under a Federal health care program,

shall be guilty of a felony and upon conviction thereof, shall be fined not more than $25,000 or imprisoned for not more than five years, or both.

TITLE 42. THE PUBLIC HEALTH AND WELFARE
CHAPTER 7. SOCIAL SECURITY ACT
TITLE XVIII. HEALTH INSURANCE FOR THE AGED AND DISABLED
PART E. MISCELLANEOUS PROVISIONS

42 U.S.C. § 1395nn(a)(1)

§ 1395nn. Limitation on certain physician referrals

(a) Prohibition of certain referrals.

(1) In general.

Except as provided in subsection (b), if a physician (or an immediate family member of such physician) has a financial relationship with an entity specified in paragraph (2), then—

(A) the physician may not make a referral to the entity for the furnishing of designated health services for which payment otherwise may be made under this subchapter, and

(B) the entity may not present or cause to be presented a claim under this subchapter or bill to any individual, third party payor, or other entity for designated health services furnished pursuant to a referral prohibited under subparagraph (A).

TITLE 42. THE PUBLIC HEALTH AND WELFARE
CHAPTER 7. SOCIAL SECURITY ACT
TITLE XVIII. HEALTH INSURANCE FOR THE AGED AND DISABLED
PART E. MISCELLANEOUS PROVISIONS

42 U.S.C. § 1395nn(e)(5)

(e) Exceptions relating to other compensation arrangements. The following shall not be considered to be a compensation arrangement described in subsection (a)(2)(B):

* * *

(5) Physician recruitment.

In the case of remuneration which is provided by a hospital to a physician to induce the physician to relocate to the geographic area served by the hospital in order to be a member of the medical staff of the hospital, if—

(A) the physician is not required to refer patients to the hospital,

(B) the amount of the remuneration under the arrangement is not determined in a manner that takes into account (directly or indirectly) the volume or value of any referrals by the referring physician, and

(C) the arrangement meets such other requirements as the Secretary may impose by regulation as needed to protect against program or patient abuse.

TITLE 42 -- PUBLIC HEALTH
CHAPTER V -- OFFICE OF INSPECTOR GENERAL -- HEALTH CARE, DEPARTMENT OF HEALTH AND HUMAN SERVICES
SUBCHAPTER B -- OIG AUTHORITIES
PART 1001 -- PROGRAM INTEGRITY -- MEDICARE AND STATE HEALTH CARE PROGRAMS
SUBPART C -- PERMISSIVE EXCLUSIONS

42 C.F.R. § 1001.952(n)(1)

§ 1001.952 Exceptions.

The following payment practices shall not be treated as a criminal offense under section 1128B of the Act and shall not serve as the basis for an exclusion:

(n) *Practitioner recruitment.* As used in section 1128B of the Act, "remuneration" does not include any payment or exchange of anything of value by an entity in order to induce a practitioner who has been practicing within his or her current specialty for less than 1 year to locate, or to induce any other practitioner to relocate, his or her primary place of practice into a HPSA for his or her specialty area, as defined in Departmental regulations, that is served by the entity, as long as all of the following nine standards are met—

(1) The arrangement is set forth in a written agreement signed by the parties that specifies the benefits provided by the entity, the terms under which the benefits are to be provided, and the obligations of each party.

APPENDIX I

PHYSICIAN RECRUITMENT AGREEMENT

THIS PHYSICIAN RECRUITMENT AGREEMENT ("Agreement") is made and entered into as of this ____ day of _____, 2000, by and between GENESIS HEALTHCARE SYSTEM, an Ohio nonprofit corporation, located at 2951 Maple Avenue, Zanesville, Ohio 43701 ("Genesis") and BRYAN MCDONNELL, M.D. with a business location of Suite 300, 751 Forest Ave., Zanesville, Ohio 43701 ("Physician").

RECITALS

Genesis, a tax-exempt entity under federal tax laws, maintains and operates health care facilities in Zanesville, Ohio, and the surrounding areas. There is an insufficient number of qualified physicians specializing in cardiothoracic surgery to meet the needs of the community within Genesis' service area of the following counties: Muskingum, Guersey, Noble, Morgan, Perry and Coshocton (the "Service Area"). Genesis desires to ensure that adequate medical care in this specialty is available to the community through the recruitment of qualified physicians. The recruitment of physicians practicing in Physician's specialty is a critical component of Genesis's overall physician recruitment program. Physician is or shall be duly licensed and able to provide services in Physician's specialty to the community. Genesis and Physician are willing, upon the terms and conditions hereinafter set forth, to enter into an agreement

whereby Genesis will assist Physician in establishing and building a practice in Genesis's service area.

STATEMENT OF AGREEMENT

NOW, THEREFORE, in consideration of the mutual promises, covenants and agreements contained herein, the parties agree as follows:

SECTION 1 DUTIES OF PHYSICIAN

Throughout the term of this Agreement, Physician agrees to and shall perform the following duties under the terms hereof:

Section 1.1 Physician shall establish on or before November 1, 2000, and, during the term of this Agreement, maintain and actively pursue a full-time cardiothoracic surgery practice in the Service Area. Physician shall be available not less than forty (40) hours per week to provide direct patient contact in Physician's practice recognizing that Physician shall be entitled to reasonable time off for vacations, seminars, etc. as mutually agreed to by the parties. "Direct patient contact" shall mean and include time spent on office, hospital and clinic visits, dictation of charts, telephone consultation and related patient service performed by the Physician. Physician shall work continuously during the term herein; provided, however, that during the term of this Agreement, Physician shall be entitled to the following leaves of absence each year with full compensation: (a) up to twenty (20) working days of vacation or continuing medical education.

Section 1.2 Physician shall establish a medical office in the Service Area which shall be appropriately equipped and staffed with equipment, furnishings and support personnel. Physician shall charge and collect all professional fees for services rendered to individual patients including, but not limited to, patients seen as inpatients and in emergency rooms, outpatient departments, clinics, and Physician's office. Physician shall undertake or cause to be undertaken all reasonable commercial steps to collect all accounts payable to Physician.

Section 1.3 Physician agrees that, pursuant to reasonable request by Genesis and consistent with Genesis' normal expectations in respect to other physicians holding medical staff privileges, Physician shall attend Genesis inpatients; provide consultations to other physicians on the medical staff at Genesis as requested; assist in the education and training of other Genesis practitioners, nurses and health care personnel; and review and assess the quality of patient care at Genesis. Physician shall be available to Genesis at such times and for such duration as are necessary for hospital rounds; meetings of the Genesis Medical Staff and committees thereof; and consultations if requested.

SECTION 2 QUALIFICATIONS OF PHYSICIAN

Section 2.1 Physician shall be duly licensed to practice medicine in the State of Ohio, and shall have all necessary narcotics and controlled substances permit numbers and licenses, a provider number for Medicare issued by the United States Department of Health and Human Services, and a provider number for Medicaid issued by the Ohio Department of Human Services.

Section 2.2 Physician shall maintain a comprehensive knowledge in Physician's specialty and shall complete all necessary continuing education requirements to maintain Physician's Ohio license to practice in such field.

Section 2.3 Physician shall at all times be an active member of the Genesis' Medical Staff, with unrestricted clinical privileges as granted by Genesis, and shall be governed by Genesis' Medical Staff Bylaws, Rules and Regulations and any applicable Genesis policies and procedures. Physician's eligibility for medical staff appointment and clinical privileges at Genesis is not governed by this Agreement, and this Agreement does not in any way modify the Medical Staff Bylaws or other governing provisions. Notwithstanding the provisions of the Medical Staff Bylaws or any applicable Genesis policies and procedures to the contrary, Genesis shall have the right to terminate this Agreement in accordance with the terms of Section 5 hereof. Such termination shall not give rise to any rights pursuant to the Genesis Medical Staff Bylaws.

SECTION 3 RECRUITMENT BENEFITS

In consideration of Physician's establishment of a private medical practice in Genesis's service area, Genesis will provide to Physician the following benefits:

Section 3.1 Reasonable moving expenses to relocate Physician and family members to the Zanesville, Ohio area. Genesis will reimburse Physician directly based on Physician's decision to take the lowest of three (3) estimates from established moving companies or the sum of Five Thousand Dollars ($5,000.00). Payment will be made directly to Physician upon receipt of the three (3) estimates and the receipt of the moving company used or a written

request from Physician requesting Five Thousand Dollars ($5,000.00).

Section 3.2 A Professional Income Guarantee as set forth in Section 4.

Section 3.3 With respect to sums advanced by Genesis pursuant to Section 3.2 Physician shall execute a Promissory Note in the form attached hereto as Exhibit A prior to Genesis making any advances under such section. Interest at the prime lending rate of National City Bank shall be charged and accrued on advances pursuant to the terms of such Note from the date of disbursement until re-payment of the advance in full.

Section 3.4 The Promissory Note shall be secured by a lien on Physician's accounts receivable as evidenced by execution of a Security Agreement in the form as attached as Exhibit B. Physician agrees to execute financing statements or other documents necessary to perfect Genesis' security interest in Physician's accounts receivable.

Section 3.5 At the end of the term of this Agreement, Genesis shall prepare a reconciliation statement showing the outstanding balance, if any, that the Physician owes to the Genesis. This amount will consist of sums advanced pursuant to Section 3.2 which are still owing to Genesis together with interest which has accrued on these sums. Physician may either:

(a) Repay the balance over a sixty (60) month period beginning with the termination date of this Agreement pursuant to the terms of the Promissory Note.

(b) Be eligible for forgiveness of one-fourth (1/4) of the

total amount owing to Hospital for each continuous full year (up to four (4) years) following the end of the term of this Agreement. In order to be eligible for forgiveness, Physician must have met the following conditions during the term of the Agreement as well as during the full year in which forgiveness is being requested: (I) the maintenance of a full-time medical practice in the Service Area which accepts Medicare and Medicaid patients; and (ii) the maintenance of an active appointment on Genesis Medical Staff. Any amounts forgiven shall constitute additional income to Physician in the year of forgiveness and Hospital shall issue a Form 1099 to Physician. All periods of forgiveness must be consecutive. In the event Physician fails to qualify for forgiveness in a given year, Physician will not be entitled to requalify for forgiveness, at a later time. At such time as Physician is no longer eligible for forgiveness, any balance remaining (together with interest) will be subject to repayment pursuant to Section 3.5(a) above.

Section 3.6 Genesis agrees to permit the payment of an experienced cardiothoracic surgeon to supervise Physician in starting his medical practice at Genesis ("Supervising Physician") to be an allowable expense under Section 4.4. The expense amount shall be Four Thousand Dollars ($4,000.00) for each day that Supervising Physician is at Genesis providing supervision services. All charges billed and income collected related to the Supervising Physician's practice while acting as the Supervising Physician shall be included under the definition of Professional Income as defined in Section 4.4.

SECTION 4 PROFESSIONAL INCOME GUARANTEE

Section 4.1 In consideration of Physician's establishment of a private medical practice in Service Area, Genesis hereby guarantees Physician a minimum annual Professional Income (as defined hereinafter in Section 4.4) in the amount of $300,000 ("Guarantee Amount") for the first year of the Guarantee Period, $320,000 for the second year of the Guarantee Period, and $340,000 for the third year of the Guarantee Period, subject to the limitation on aggregate advances under Section 4.3, for each of the three (3) years beginning on the first date that Physician begins providing services pursuant to this Agreement ("Guarantee Period") to be calculated and paid as forth below.

Section 4.2 During the term of the Guarantee Period, Physician shall submit a monthly report including the following data for the month: gross collections attributable to Physician's practice, gross collections attributable to Supervising Physician's practice at Genesis when acting as a Supervising Physician, professional expenses related to Physician, net practice income and advance requested or repayment due. Genesis will provide the necessary reporting form. Such report will not be required if all the subsidy advances have been repaid by Physician.

Section 4.3 The Professional Income Guarantee shall be paid as follows:

(a) If the Professional Income of Physician in any calendar month during the first year of Guarantee Period is less than Twenty-Five Thousand Dollars ($25,000), Genesis shall pay to Physician within fifteen (15) days after receiving the monthly report from Physician, the difference between Twenty-Five

Thousand Dollars ($25,000) and the Professional Income collected by the Physician; provided that under no circumstances shall aggregate advances to Physician under the Professional Income Guarantee during the first year of the Guarantee period exceed Three Hundred Thousand Dollars ($300,000).

(b) If the Professional Income of Physician in any calendar month during the second year of Guarantee Period is less than Twenty-Six Thousand Six Hundred Sixty-Seven Dollars ($26,667), Genesis shall pay to Physician within fifteen (15) days after receiving the monthly report from Physician, the difference between Twenty-Six Thousand Six Hundred Sixty-Seven Dollars ($26,667) and the Professional Income collected by the Physician; provided that under no circumstances shall aggregate advances to Physician under the Professional Income Guarantee during the second year of the Guarantee period exceed Three Hundred Twenty Thousand Dollars ($320,000).

(c) If the Professional Income of Physician in any calendar month during the third year of Guarantee Period is less than Twenty-Eight Thousand Three Hundred Thirty-Four Dollars ($28,334), Genesis shall pay to Physician within fifteen (15) days after receiving the monthly report from Physician, the difference between Twenty-Eight Thousand Three Hundred Thirty-Four Dollars ($28,334) and the Professional Income collected by the Physician; provided that under no circumstances shall aggregate advances to Physician under the Professional Income Guarantee during the third year of the Guarantee period exceed Three Hundred Forty Thousand Dollars ($340,000).

(d) During the first year of the Guarantee Period, in those months where the Professional Income collected by the Physician exceeds $25,000, such excess amount shall be paid by Physician, within fifteen (15) days after sending the monthly report, to Genesis and applied to (and not to exceed) the sums previously paid by Genesis to Physician under Subsection 4.3(a).

(e) During the second year of the Guarantee Period, in those months where the Professional Income collected by the Physician exceeds $26,667, such excess amount shall be paid by Physician, within fifteen (15) days after sending the monthly report, to Genesis and applied to (and not to exceed) the sums previously, paid by Genesis to Physician under Subsection 4.3(b).

(f) During the third year of the Guarantee Period, in those months where the Professional Income collected by the Physician exceeds $28,334 such excess amount shall be paid by Physician, within fifteen (15) days after sending the monthly report, to Genesis and applied to (and not to exceed) the sums previously paid by Genesis to Physician under Subsection 4.3(c).

Section 4.4 "Professional Income" for purposes of this Agreement shall mean the total of all professional fees collected by or on behalf of Physician as the result of Direct Patient Contact and related services in connection with Physician's private medical practice but excluding income or collections from other sources such as speaking engagements, publications or writing, and the total of all professional fees collected by or on behalf of the Supervising Physician for all surgeries, procedures or medical care provided at Genesis while acting as the Supervising Physician, during each calendar month minus the total sum of "reasonable and

necessary office expenses" (as defined below) paid by or on behalf of Physician during that month in connection with Physician's private medical practice in Service Area. Reasonable and necessary office expenses shall include the following:

(a) straight-line method depreciation, lease and/or rental charges for space and equipment;

(b) utilities;

(c) interest payments;

(d) salary, fringe benefits and payroll taxes for non-physician employees of Physician;

(e) premiums for professional liability insurance;

(f) pharmaceutical, medical and office supplies;

(g) purchased clinical diagnostic services;

(h) ordinary repairs and maintenance expenses;

(I) premiums for general casualty and liability insurance;

(j) real and personal property taxes;

(k) continuing medical education expenses not to exceed $2,000.00 annually;

(1) marketing/advertising expenses;

(m) waste removal;

(n) medical association dues;

(o) licensure fees;

(p) medical periodical costs;

(q) health insurance benefits and disability insurance;

(r) reasonable legal and accounting fees;

(s) reasonable billing services fees;

(t) car phone and pager costs not to exceed $3,000.00 annually;

(u) travel/automobile expenses not to exceed $3,600.00 per year;

(v) payment for a Supervising Physician of $4,000.00 for each day Supervising Physician is at Genesis performing surgery and procedures with Physician during the first twelve weeks of this Agreement; and,

(w) any other ordinary and necessary expenses of operating a medical practice in the Service Area.

Section 4.5 "Reasonable and necessary office expenses" for the purpose of calculating Professional Income of Physician shall not include: (a) any cost or expense that is not related to Physician's medical practice in Genesis's service area; (b) any salary or compensation (including without limitation deferred compensation or retirement benefits) paid to or for the benefit of Physician; (c) any income or self employment tax levied on Physician's income

or compensation; (d) any cost or expense, including but not limited to any overhead cost, or portion thereof, allocable to any other physician, professional, individual or entity with or for whom Physician may practice or share space; (e) hospital medical staff dues; (f) Quality Care Partners membership fees; (g) Ohio medical license fees; (h) federal, state and local income taxes of Physician; or (I) any expenses owing to Physician as part of any subsidy contained in Section 3. Furthermore, Genesis will not reimburse for equipment costs, depreciation, interest or lease costs for the acquisition of equipment by or for Physician that would directly compete with services provided by Genesis without the written permission of Genesis.

Section 4.6 Physician shall allow Genesis's designee reasonable access to Physician's business records to confirm reported calculation, allocation and payments of Professional Income and payments made under this Professional Income Guarantee pursuant to this Section 4. In the event that Physician shares a medical practice with another physician(s), professional(s), or professional group, or is employed by another physician(s) or professional(s), or professional group or any other entity, Physician shall obtain, and provide a copy to Genesis of, the consent of such other physician, professional, group or entity to allow Genesis's designee access to and examination of any records of such physician, professional, group or entity, which may contain information relevant to the calculation, allocation and payments of Professional Income and payments under the Professional Income Guarantee of this Agreement.

Section 4.7 In the event that Physician becomes totally disabled during the term of this Agreement, payments pursuant to Section 4 shall terminate upon the earlier of: (a) the ninetieth (90^{th}) day after the onset of the disability; or

(b) the first day on which Physician is eligible to receive benefits under Physician's personal disability insurance coverage. Within thirty (30) days of the Start Date of this Agreement, Physician shall furnish Genesis with proof of disability insurance that provides for payments to commence within ninety (90) days of the onset of the disability. For the purposes of this Agreement, the term "disabled" shall mean that Physician is unable to provide Direct Patient Contact because of a disabling health condition. In the event that Physician becomes partially disabled, the parties agree to negotiate in good faith in determining whether an adjustment can be made to the hours to be worked by Physician with a corresponding reduction in Physician's entitlement to forgiveness.

SECTION 5 TERM AND TERMINATION

Section 5.1 The term of this Agreement shall commence on Physician's first day of medical practice in the Service Area ("Start Date") and shall continue thereafter for a period of three (3) years; provided, however, that this Agreement may be terminated at any time upon mutual agreement of the parties.

Section 5.2 In the event that either party breaches this Agreement by materially failing to perform its duties as required herein (the "Breaching Party") the non-Breaching Party may give written notice to the Breaching Party of such material failure to perform and demand performance. If the Breaching Party fails to cure such material non-performance required by this Agreement within thirty (30) days of such written notice, the non-Breaching Party may terminate this Agreement without waiver of any rights that such party may have against the Breaching Party for such failure to perform.

Section 5.3 Physician may terminate this Agreement at any time upon thirty (30) days written notice to Genesis.

Section 5.4 Either Genesis or Physician shall be entitled to terminate this Agreement immediately upon written notice to the other and to recover from the other any payment that is determined by a court or government agency to be illegal or inconsistent with Genesis's tax-exempt status. Either Genesis or Physician may terminate this Agreement effective immediately upon giving written notice, if the other party engages in an act for which the Breaching Party has previously received a thirty (30) day notice pursuant to Section 5.2.

Section 5.5 Physician may terminate this Agreement effective immediately upon giving written notice if Genesis totally ceases to operate as an acute care health facility. Genesis may terminate this Agreement immediately upon the occurrence of any of the following events:

(a) Physician fails to start Physician's medical practice in the Service Area on or before November 1, 2000;

(b) Physician ceases the active practice of medicine in the Service Area;

(c) Physician's death;

(d) Physician's Medical Staff appointment and/or clinical privileges at Genesis are suspended for a period of thirty (30) days or longer or are revoked;

(e) Physician's license to practice medicine in the State of Ohio is suspended or revoked;

(f) Physician is suspended or excluded from the Medicare or Medicaid program;

(g) Physician fails to maintain the qualifications set forth in Section 2;

(h) Physician acts in a manner to endanger patient care, or to discredit the goodwill and reputation of Genesis; or

(I) Physician is convicted of a felony.

Section 5.6 Termination of this Agreement pursuant to Section 5.2, 5.3, 5.4, or 5.5 shall also terminate Physician's right to forgiveness pursuant to Section 3.5. This Agreement shall otherwise survive for purposes of enforcing any payment obligations or remaining duties and/or other obligations of the respective parties subsequent to termination of this Agreement.

Section 5.7 Notwithstanding Section 5.5 and Section 5.6 above, in the event of death or permanent disability of Physician, if the amount owed to Genesis exceeds the collateral pursuant to the Security Agreement executed of even date herewith, Genesis is entitled to collect on the collateral and the balance of Physician's indebtedness shall be forgiven.

Section 5.8 In the event of Physician's death, any unpaid balance of principal and interest due to Genesis, and any other repayment obligation of Physician to Genesis, shall be extinguished. Genesis may purchase or otherwise arrange for insurance to cover the payment of such unpaid amount. Physician agrees to execute any and all documents Genesis may request for this purpose.

SECTION 6 INSURANCE

Physician warrants that Physician shall maintain valid professional liability insurance which conforms to the specifications for such insurance as in effect from time to time under the Medical Staff Bylaws. Physician shall furnish Genesis evidence satisfactory to Genesis of such coverage prior to the Start Date of this Agreement, and as may be requested by Genesis from time to time during the term of this Agreement. Genesis assumes no liability for any acts or omissions of Physician in the performance of the private practice of medicine.

SECTION 7 ACCESS TO BOOKS, DOCUMENTS, AND RECORDS OF PHYSICIAN

To the extent Section 952 of the Omnibus Reconciliation Act of 1980 (Public Law 96-499) is found applicable to this Agreement, until the expiration of four (4) years after the furnishings of services pursuant to this Agreement, Physician agrees to make available, upon written request by the Secretary of the Department of Health and Human Services ("Secretary"), the Comptroller General of the United States, or to any of their duly authorized representatives, this Agreement, and books, documents, and records of Physician that are necessary to certify the extent of any costs of Genesis arising from the Agreement. Further, if Physician carries out any of Physician's duties arising from this Agreement through a subcontractor, the value or cost of which is $10,000.00 or more over a twelve (12) month period, with a related organization, such subcontract shall contain a clause to the effect and until the expiration of the four (4) years after furnishing of such service pursuant to such subcontract, that the related organization shall make available upon written request to the Secretary, the Comptroller General of the

United States, or any of their duly authorized representatives subcontracts books, documents, and records of such organization that are necessary to verify the nature and extent of such costs.

SECTION 8 RELATIONSHIP OF PARTIES

It is agreed that in performing the obligations hereunder, Physician shall be and is an independent contractor of Genesis, and that nothing herein shall be construed so as to establish an employment, master-servant, agency or other like relationship between Genesis and Physician, or between the employees, agents, members, and contractors of Genesis and Physician. Genesis shall neither have nor exercise any control or discretion over the methods by which Physician will perform Physician's duties and functions. As between Genesis and Physician, Physician shall be responsible for all applicable federal, state, and local income taxes, gross receipt taxes, FICA, unemployment, and disability benefits and workers' compensation obligations that may arise in connection with the Professional Income Guarantee and the services provided by Physician pursuant to this Agreement.

SECTION 9 CONFIDENTIALITY

Neither party shall disclose to any person or entity any terms or provisions of this Agreement without consent of the other party, except pursuant to the bona fide request of any auditor for either party, any interested government agency or except to Physician's banker, business consultant, attorney or accountant, provided such professionals have agreed prior to disclosure to maintain in confidence any such confidential information disclosed to them by Physician.

SECTION 10 NOTICES

All notices, requests, demands, approvals and other communications required or permitted by this Agreement shall be in writing and sent by certified mail, by personal delivery, or by fax, with confirmation of receipt, and shall conclusively be deemed to have been received on the date such notice is delivered at the address first written above or at such other address as either party may from time to time designate, or, in the case of certified mail, on the third (3rd) business day following the date on which it was mailed to such address.

SECTION 11 MISCELLANEOUS

Section 11.1 Either Genesis or Physician may request a modification of this Agreement by written notice in the event of a change in or binding interpretation of a law, regulation or administrative policy by any government entity that materially affects the terms of this Agreement, or the Medicare/Medicaid provider status of either party or the tax exempt status of Genesis. In the event that the parties are unable to agree upon an acceptable modification, then either party shall have the right to terminate this Agreement.

Section 11.2 This Agreement constitutes the entire understanding among the parties in respect of the subject matter of this Agreement. This Agreement supersedes all prior and contemporaneous understandings or agreements between the parties in respect to the subject matter of this Agreement. This Agreement may at any time be amended in whole or part by written instrument executed by each party. Neither any failure nor any delay on the part of any party in exercising any right, power, or privilege hereunder shall operate as a waiver thereof on the part of such party, nor shall

a single or partial exercise thereof preclude any other or further exercise or the exercise of any other right, power of privilege by such party. This Agreement may not be assigned by any party without the prior written consent of the other parties. This Agreement shall be binding upon and inure to the benefit of the parties and their successors and assigns. Should any provision or portion of this Agreement be held unenforceable or invalid for any reason, the remaining provisions or portion of this Agreement shall continue in full force and effect. This Agreement shall be governed by and construed in accordance with the laws of the State of Ohio, and Muskingum County, Ohio shall be the proper place of venue for all matters.

SIGNATURES

IN WITNESS WHEREOF, the parties hereto have executed this Agreement on the date and year first above written.

GENESIS HEALTHCARE SYSTEM:

By: /s/

Its: Pres &CEO

PHYSICIAN:

Bryan McDonnell, M.D.

APPENDIX J

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

CASE NO. C2 03 0079

[Filed April 26, 2004]

BRYAN E. McDONNELL Plaintiff	)
v.	)
CARDIOTHORACIC & VASCULAR SURGICAL ASSOCIATES, INC. et al. Defendants	)

JUDGE FROST
MAGISTRATE JUDGE KEMP

SECOND AMENDED COMPLAINT
DEMAND FOR JURY TRIAL

For his second amended complaint ("Complaint") against Cardiothoracic & Vascular Surgical Associates, Inc. ("CVSA"), Cardiothoracic and Vascular Surgical Specialists, Inc. ("CVSS") and Genesis HealthCare System ("Genesis"), Bryan E. McDonnell, M.D., alleges and avers as follows:

PARTIES

1. Dr. McDonnell is a citizen of Pennsylvania residing at 210 East 42nd Street, Dallas, Pennsylvania 18612. Dr. McDonnell is a cardiothoracic surgeon licensed to practice medicine in Pennsylvania.

2. Genesis is an Ohio nonprofit corporation having its principal place of business at 800 Forest Avenue, Zanesville, Ohio 43701. It is engaged in the business of providing healthcare services, and it owns and operates the Good Samaritan Hospital ("Zanesville Hospital") and Bethesda Hospital in Zanesville.

3. CVSA is an Ohio professional corporation having its principal place of business at 3555 Olentangy River Road, Suite 2070, Columbus, Ohio 43214. Its shareholders are or have been cardiothoracic surgeons, and it is engaged in the business of providing cardiothoracic and vascular surgical services at hospitals in Columbus, and it previously provided such services at the Zanesville Hospital.

4. CVSS is an Ohio professional corporation incorporated September 19, 2002 having its principal place of business at 3555 Olentangy River Road, Columbus, Ohio 43214. Its shareholders are cardiothoracic surgeons, and it is engaged in the business of providing cardiothoracic and vascular surgical services at hospitals in Columbus, and it currently provides such services at the Zanesville Hospital.

5. CVSS is the successor in interest to CVSA as to all matters relevant to the claims asserted against CVSA in this Complaint and is liable for all debts, obligations and liabilities of any kind of CVSA or claims or causes of action against CVSA arising prior to January 1, 2003, including, without

limitation, all claims of Dr. McDonnell asserted against CVSA in this Complaint. CVSS took over the business of CVSA as of January 1, 2003, effectively merging the business of CVSA into CVSS, and the business of CVSS is a mere continuation of the business of CVSA. Upon information and belief, CVSA and its shareholders transferred the assets and business of CVSA, including its provision of cardiothoracic surgical services at the Zanesville Hospital, to CVSS, and CVSS took over the assets and business of CVSA, for the specific fraudulent purpose of avoiding any liability to Dr. McDonnell under the claims asserted in this action.

6. In furtherance of CVSA's scheme fraudulently to avoid any liability to Dr. McDonnell, CVSA on or about December 31, 2002 sold to CVSS its office equipment, furnishings and other tangible property used in its business and, upon information and belief, sold or transferred to CVSS, which had only been incorporated since September 19, all of its ongoing business activities, including, without limitation, the performance of cardiothoracic surgery services at the Zanesville Hospital and other facilities. The foregoing transfers were not arm's length, were solely for the benefit of CVSA and its shareholders and were solely between and among the shareholders of CVSA. Upon information and belief, CVSA received less than a reasonably equivalent value in exchange for the transfers, and the transfers were made with actual intent to hinder, delay or defraud Dr. McDonnell. As a direct and intended result of the transfers, CVSA became insolvent, and all income from the business of CVSA was diverted to CVSS.

JURISDICTION AND VENUE

7. This Court has subject matter jurisdiction of this action pursuant to 28 U.S.C. § 1332(a). The action is between

citizens of different states, and the amount in controversy exceeds the sum or value of $75,000, exclusive of interest and costs. Venue is proper in this judicial district pursuant to 28 U.S.C. § 1391(a) because Genesis, CVSA and CVSS reside in this district and a substantial part of the events or omissions giving rise to the claims in this action occurred in this district.

FACTS

8. Dr. McDonnell is a board-certified general and cardiothoracic surgeon and a fellow of the American College of Surgeons. He was a Lieutenant Colonel in the United States Army and Chief of Cardiothoracic Surgery at Walter Reed Army Medical Center in Washington, D.C., through September 2000.

9. Dr. McDonnell accepted an offer of employment in September 2000 from CVSA, and he signed an Employment Agreement with CVSA on September 19, 2000, a copy of which is Exhibit 1 to the initial complaint in this action. CVSA represented to Dr. McDonnell prior to his signing the Employment Agreement that he would be employed to initiate and develop an open-heart surgery practice at the Zanesville Hospital. He was assured at this time by CVSA principal Charles Bush, M.D., that he would have the ability to relocate to Columbus in due course and that he would be offered at the conclusion of his 36-month employment term the privilege of purchasing shares of stock with a view toward ultimately achieving full parity of stock ownership in CVSA with its other physician-shareholders.

10. Dr. McDonnell was assured in advance of signing the Employment Agreement by CVSA principals Dr. Bush and William Watson, M.D., that the program would start slowly, with operations only on Mondays and Tuesdays and with

patients released before the weekend. He was assured that no angioplasties would be done during the first year. Further, he was assured that there would be coverage by fellow members of the CVSA group and others sufficient to allow Dr. McDonnell reasonable time off for professional development, personal matters and vacations.

11. In reliance upon these and other representations and assurances, as well as the promises in the Employment Agreement, Dr. McDonnell resigned his commission in the United States Army, gave up his position as Chief of Cardiothoracic Surgery at Walter Reed Army Medical Center and his surgical practice there and purchased a house and moved his wife and three young children to Zanesville in October 2000.

12. Pursuant to an August 10, 2000, agreement between Genesis and CVSA, the Exclusive Services Agreement for Cardiothoracic Surgery Program ("Exclusive Services Agreement"), a copy of which is Exhibit 2 to the initial complaint, CVSA agreed to provide a full-time cardiothoracic surgeon to establish an open-heart surgery program at the Zanesville Hospital. Upon information and belief, Genesis sought to establish an open-heart surgery program because of the prestige it would bring the Zanesville Hospital and because it could prove highly profitable to Genesis. Genesis agreed that CVSA would be the exclusive provider of certain surgical procedures at the Zanesville Hospital, including open-heart procedures such as coronary artery bypass surgery. Dr. McDonnell was not party to and was not given a copy of the Exclusive Services Agreement, despite the fact that CVSA had entered into that Agreement less than a month before its employment negotiations with Dr. McDonnell were concluded.

13. After arriving in Zanesville, Dr. McDonnell undertook to establish the open-heart surgery program at the Zanesville Hospital, and he performed his first operation there on October 30, 2000. He thereafter performed open-heart surgery at the Zanesville Hospital on a weekly or more frequent basis.

14. CVSA incurred significant expenses in providing open-heart surgery services pursuant to the Exclusive Services Agreement. These included Dr. McDonnell's salary, salary for supporting staff, office expenses and costs associated with providing additional physician coverage. Despite the fact that the Exclusive Services Agreement had no provision for payment by Genesis of any part of these expenses, Genesis and CVSA had, upon information and belief, reached agreement even before execution of the Exclusive Services Agreement that Genesis would fully reimburse CVSA for all of its expenses associated with providing open-heart surgery services at the Zanesville Hospital.

15. Upon information and belief, a substantial percentage of revenues received by Genesis from the open-heart surgery program was derived from the federal health care program and was therefore subject to federal and state fraud and abuse laws and regulations, including the Anti-Kickback Law, Stark Law and Medicare reassignment provisions. The Anti-Kickback Law, 42 U.S.C. § 1320a -7b, prohibits a person or firm from providing or soliciting remuneration as an inducement for referrals of Medicare, Medicaid or other federal healthcare program patients. Under the federal law prohibiting self-referrals, the Stark Law, 42 U.S.C. § 1395nn, a physician is prohibited from making certain referrals to entities with which the physician has a financial relationship. Medicare's reassignment provisions, Medicare Carriers' Manual ("MCN") § 3060, generally prohibit the

reassignment of a physician's accounts receivable to a third party, except under limited exceptions. There are also corresponding Ohio statutes prohibiting reassignment of physician's accounts.

16. The Anti-Kickback Law and Stark Law had application to the relationship between Genesis and CVSA under which CVSA was the exclusive provider of open-heart surgery services at the Zanesville Hospital, and, upon information and belief, any payment by Genesis to CVSA related to the services would have violated both the Anti-Kickback Law and the Stark Law unless the payment were to have fallen within a recognized "safe harbor" or exception to the laws. Further, any assignment of Dr. McDonnell's or CVSA's accounts receivable to Genesis would violate the Medicare and state reassignment provisions.

17. One of the recognized exceptions to the prohibitions of the Medicare fraud and abuse laws is a hospital's payment of compensation to a physician who has been recruited to work at the hospital under certain limited circumstances. For a physician recruitment agreement, as it is called, to constitute a safe harbor under the Anti-Kickback Law, it must, among other things, be in writing and it must attract a primary care or similar physician to a geographic area designated by the federal government as having a shortage of primary care physicians.

18. Upon information and belief, Genesis and CVSA reached agreement before September 19, 2000, to use a physician recruitment agreement as a legal subterfuge for what would otherwise constitute illegal payments by Genesis to CVSA.

19. Without consultation with, notice to or any knowledge on the part of Dr. McDonnell, Genesis or CVSA (or both of them) prepared a Physician Recruitment Agreement (appended as Exhibit 3(A) to the initial complaint), with certain ancillary agreements, including a Security Agreement (Exhibit 3(B)), a Consent to Assignment (Exhibit 3(C)), an Agreement of Assignment (Exhibit 3(D)) (collectively, the "Ancillary Agreements") and a Cognovit Promissory Note ("Cognovit Note") (Exhibit 3(E)). The Physician Recruitment Agreement, Cognovit Note and Ancillary Agreements were delivered to Dr. McDonnell in early February 2001 for his signature, nearly four months after his relocation to Zanesville. This was the first that he had heard of or seen any of these agreements.

20. The parties to the proposed Physician Recruitment Agreement were Genesis and Dr. McDonnell. The Physician Recruitment Agreement purported to "recruit" Dr. McDonnell to provide cardiothoracic surgery services in Zanesville and to give him medical staff privileges at the Zanesville Hospital. It provided that Dr. McDonnell "shall establish" on or before November 1, 2000 -- almost four months before he had even seen the Physician Recruitment Agreement -- a full-time cardiothoracic surgery practice in Genesis' service area, comprising Muskingum, Guernsey, Noble, Morgan, Perry and Coshocton Counties. In return for Dr. McDonnell's "establishment of a private medical practice" in the area, Genesis would guarantee him a minimum annual compensation for a 3-year period. (Physician Recruitment Agreement § 4.1).

21. The Cognovit Note in the amount of $960,000 would have required Dr. McDonnell to repay all or a portion of the annual compensation payments provided for in the Physician Recruitment Agreement, if he were to leave the Zanesville

area before the expiration of seven years. The Physician Recruitment Agreement, together with the Cognovit Note, repudiate the salary provisions in the Employment Agreement, which provides for unconditional payment of Dr. McDonnell's salary. Another agreement that Defendants were requiring Dr. McDonnell to sign was a Consent to Assignment, to which Genesis, CVSA and Dr. McDonnell were parties and which permitted Genesis to pay directly to CVSA the payments that it would otherwise be making to Dr. McDonnell under the Physician Recruitment Agreement. Additionally, as part of the overall scheme created through the Physician Recruitment Agreement, CVSA and Genesis entered into a Security Agreement (Exhibit 3(B)), under the terms of which CVSA illegally granted Genesis the right to collect, among other things, CVSA's and Dr. McDonnell's accounts receivable in violation of the Medicare and state reassignment provisions.

22. Dr. McDonnell declined to sign the Physician Recruitment Agreement, Cognovit Note and the Ancillary Agreements. He declined to sign the Physician Recruitment Agreement because, among other reasons, it falsely implied that he had been recruited by Genesis, rather than by CVSA, to accept the position in Zanesville, falsely stated that Genesis and he had agreed that it would assist him in establishing a practice in the Zanesville area, falsely implied that Genesis had been involved in offering him employment and falsely stated that the Physician Recruitment Agreement was an inducement for him to establish a practice in the Zanesville area.

23. Dr. McDonnell declined to sign the Cognovit Note because it would have subjected him to personal liability, without any defenses and without regard to any changed future circumstances, in the amount of nearly $1,000,000.

24. Counsel for CVSA repeatedly told Dr. McDonnell that the Physician Recruitment Agreement, Cognovit Note and Ancillary Agreements needed to be signed in order to prevent reimbursement payments by Genesis to CVSA from constituting illegal kickbacks under federal and state fraud and abuse laws.

25. The foregoing statements were false, and, in point of fact, the Physician Recruitment Agreement would not have -- even if signed by Dr. McDonnell -- provided a safe harbor under state and federal Anti-Kickback Law for payments by Genesis to CVSA. It was fatally defective on multiple grounds, the first and foremost of which was the fact that it was not signed in advance of Dr. McDonnell's move to Zanesville and played absolutely no part in his decision to practice in Zanesville. Neither would it have provided any exception to the federal Stark Law nor Medicare and state reassignment provisions.

26. Genesis and CVSA knew that the Physician Recruitment Agreement played no role whatsoever in Dr. McDonnell's decision to accept employment with CVSA and move to Zanesville, and, upon information and belief, they knew, or had reason to know, that the Physician Recruitment Agreement would not provide a safe harbor under the Anti-Kickback Law and would not fall within any exception under the Stark Law or Medicare reassignment provisions.

27. Despite knowledge that the Physician Recruitment Agreement would be invalid and ineffective for its purported purpose and was, on its face, false and fraudulent, CVSA and Genesis demanded that Dr. McDonnell sign it, the Cognovit Note and the Ancillary Agreements. They did so in order to facilitate reimbursement of CVSA's costs in providing open-heart surgery services at the Zanesville Hospital and thereby

give CVSA an incentive to continue to provide the services and refer patients to Zanesville Hospital rather than elsewhere. When Dr. McDonnell refused to sign the Physician Recruitment Agreement and the Ancillary Agreements, Genesis and CVSA sought to intimidate and coerce him into signing.

COUNT I
FRAUD BY CVSA

28. Dr. McDonnell incorporates by reference and realleges as if fully set forth herein Paragraphs 1 - 27 of the Complaint.

29. In evaluating whether to accept employment with CVSA, Dr. McDonnell relied upon representations made by one or more principals of CVSA about the nature of his future employment. He was promised by Dr. Bush -- and the promise was memorialized at § 8 of the Employment Agreement -- that he would be entitled to reasonable time off, including, without limitation, four weeks of compensatory time off during his first year of employment. He was promised, as well, that he would be offered, in the event of a mutually satisfactory employment relationship, the privilege of purchasing shares of the common stock of CVSA at the end of his 36-month employment term and eventually achieving full stock ownership on parity with other physicians in CVSA. This promise was memorialized at § 13 of the Employment Agreement.

30. CVSA knew, or had reason to know, at the time that it promised Dr. McDonnell reasonable time off that it would be impossible for him to take anything approaching reasonable time off, and, upon information and belief, it had no intention of honoring the promise to provide adequate

coverage. It knew, or had reason to know, that Genesis had committed to the Ohio Department of Health in May 2000 that it met all of the applicable statutory and regulatory requirements for the provision of adult open-heart service at the Zanesville Hospital, including the requirement for qualified physician coverage 24 hours a day, 7 days a week, 365 days a year. Unknown to Dr. McDonnell, CVSA had no intention of assigning any qualified physicians other than Dr. McDonnell to the Zanesville Hospital, and it knew, or should have known, that it would fall upon Dr. McDonnell's shoulders to provide the 24/7 coverage to which Genesis and CVSA were legally committed. In point of fact, Dr. McDonnell worked 49 weekends during one 52-week period, and he worked and rounded at the Zanesville Hospital or Bethesda Hospital 340 out of 365 days in his first year of practice in Zanesville.

31. Upon information and belief, CVSA had from the outset no intention of honoring its promise to offer Dr. McDonnell the privilege of purchasing shares of common stock in CVSA at the conclusion of his 36-month employment period.

32. Prior to September 2000, in discussing the terms and conditions of future employment with Dr. McDonnell, CVSA had a duty to disclose material information about the nature of his employment relationship with CVSA. Notwithstanding this duty, CVSA intentionally failed to disclose crucial information to Dr. McDonnell. Among other things, it failed to inform Dr. McDonnell that either CVSA or Genesis could terminate the Exclusive Services Agreement without notice to Dr. McDonnell and that, upon termination, Dr. McDonnell would lose all of his clinical privileges at the Zanesville Hospital without any due process recourse under the Zanesville Hospital's medical staff bylaws. (Exclusive

Services Agreement § 9.4). All the while, CVSA knew that Dr. McDonnell, relying upon a contrary understanding, would resign his commission in the United States Army, give up his position as Chief of Cardiothoracic Surgery at Walter Reed Army Medical Center and his surgical practice there, purchase a house and move his wife and three young children to Zanesville.

33. Neither did CVSA disclose to Dr. McDonnell that he would have to sign the Physician Recruitment Agreement to provide a "legal" fiction for what in fact would constitute payments by Genesis to CVSA in violation of state and federal fraud and abuse laws, self-referral prohibitions and reassignment provisions. Upon information and belief, CVSA had made this determination, either independently or in consultation with Genesis, sometime prior to September 19, 2000. It failed to disclose that it would require him to sign the Physician Recruitment Agreement, and it failed to disclose that it would require him to sign the Cognovit Note providing for forfeiture of the principal balance in the amount of $960,000. The Physician Recruitment Agreement along with the Cognovit Note and the Ancillary Agreements repudiate the Employment Agreement under which Dr. McDonnell's salary is unconditionally guaranteed. The Physician Recruitment Agreement, in contrast, makes his entire 36-month salary, in the amount of $960,000, subject to repayment if he did not continue to work at the Zanesville Hospital for seven years.

34. Dr. McDonnell reasonably relied upon the foregoing affirmative promises and representations and failures to disclose material facts in deciding to accept employment from CVSA and resign his commission in the United States Army, give up his position as Chief of Cardiothoracic Surgery at Walter Reed Army Medical Center and his surgical practice

there, purchase a house and move his wife and three young children to Zanesville.

35. Upon information and belief, CVSA made the foregoing promises and representations knowing at the time they were made that they were false or that it had no intention of honoring them, and it failed to disclose the foregoing material information knowing at the time of the failure to disclose that, if disclosed, the information would have been material to Dr. McDonnell and would have influenced his evaluation of whether to resign his Army commission, quit his job, give up his practice, purchase a residence and relocate his family to Zanesville.

36. But for CVSA's false and fraudulent representations and omissions, Dr. McDonnell would not have resigned his Army commission, quit his job, given up his practice, purchased a residence and relocated his family to Zanesville.

37. The foregoing fraudulent representations and omissions by CVSA were intentional and malicious and made in reckless disregard of the rights of Dr. McDonnell.

38. As a direct result of CVSA's false and fraudulent representations and omissions, Dr. McDonnell has incurred substantial costs and expenses in excess of $600,000 and sustained other damages.

COUNT II
WRONGFUL DISCHARGE BY CVSA IN VIOLATION OF PUBLIC POLICY

39. Dr. McDonnell incorporates by reference and realleges as if fully set forth herein Paragraphs 1 - 27 and 29 - 38 of the Complaint.

40. The Anti-Kickback Law, the Stark Law and Medicare reassignment provisions express clear and unequivocal public policies of the United States and the State of Ohio against fraud and abuse in federal and state healthcare programs, including Medicare and Medicaid. The Anti-Kickback Law, the Stark Law and Medicare reassignment provisions, among other purposes, are intended respectively to prevent payments to induce referrals of Medicare and Medicaid patients, self-referrals to entities with which a physician has a financial relationship and the assignment of a physician's accounts receivable to third parties.

41. The scheme created by CVSA and Genesis, which is embodied in the Recruitment Agreement, the Cognovit Note and the Ancillary Agreements, violates federal and state public policy as expressed in the Anti-Kickback Law, the Stark Law, Medicare reassignment provisions and Ohio law. Among other things, the Physician Recruitment Agreement was not signed in advance of Dr. McDonnell's move to Zanesville and played absolutely no part in his decision to practice in Zanesville. Without this safe harbor, the scheme created by Genesis and CVSA would provide illegal payments in violation of federal and state law.

42. CVSA sought to intimidate and coerce Dr. McDonnell into participating in the illegal scheme embodied in the

Recruitment Agreement, the Cognovit Note and the Ancillary Agreements.

43. CVSA attempted to force Dr. McDonnell to falsely represent that he was accepting employment with CVSA and moving to Zanesville as a result of signing the Physician Recruitment Agreement after February 2001, when in fact he had accepted employment and moved to Zanesville months earlier.

44. CVSA attempted to force Dr. McDonnell to sign the Physician Recruitment Agreement under the pretext that it would justify payments which would be illegal absent some safe harbor under federal and state statutes prohibiting fraud and abuse.

45. Because the Physician Recruitment Agreement would not qualify for any safe harbor under federal statutes prohibiting fraud and abuse, Dr. McDonnell's participation in the scheme created by Genesis and CVSA would have required him to participate in an illegal plan to defraud the United States and the State of Ohio.

46. When Dr. McDonnell would not participate in the illegal scheme created by Genesis and CVSA, CVSA retaliated against him by refusing to provide physicians to help Dr. McDonnell meet the Ohio Department of Health requirement for 24/7 coverage of CVSA's Zanesville Hospital cardiac patients, causing him to work 49 weekends during one 52-week period, and to work and perform rounds at the Zanesville Hospital or Bethesda Hospital 340 out of 365 days in his first year of practice in Zanesville. Further, CVSA revealed to Dr. McDonnell that, contrary to its earlier representations and promises, it did not intend to allow him

to transfer at any time to Columbus, to purchase stock in CVSA or to share in its profits.

47. As a result of CVSA's requirement that Dr. McDonnell make false representations and participate in an illegal scheme, Dr. McDonnell had no choice but to oppose these activities. When he refused to join in its illegal scheme, CVSA harassed Dr. McDonnell, making it impossible for him to continue to perform his duties. As a result of CVSA's actions, Dr. McDonnell was constructively discharged from employment with CVSA.

48. To permit CVSA to constructively discharge Dr. McDonnell for refusal to make false representations and to participate in an illegal scheme would jeopardize public policy as expressed in federal and state law, including the Anti-Kickback Law, the Stark Law and Medicare reassignment provisions.

49. Dr. McDonnell's constructive discharge was a result of CVSA's insistence that he make false representations and participate in an illegal healthcare scheme and Dr. McDonnell's refusal to make such representations and participate in the illegal healthcare scheme.

50. CVSA had no legitimate business justification for forcing Dr. McDonnell to participate in the illegal scheme involving the Physician Recruitment Agreement.

51. CVSA's actions constitute a breach of public policy and are willful, wanton and malicious in nature.

52. As a direct and proximate result of CVSA's misconduct, Dr. McDonnell has suffered damages in excess of $1,000,000 for which he is entitled to recover, including

lost wages and benefits, lost profits, relocation expenses, injury to his reputation and emotional distress.

COUNT III
BREACH BY CVSA OF THE EMPLOYMENT AGREEMENT

53. Dr. McDonnell realleges and incorporates by reference as if fully set forth herein Paragraphs 1 - 27, 29 - 38 and 40 - 52 of the Complaint.

54. CVSA pressured Dr. McDonnell to sign the Physician Recruitment Agreement, Cognovit Note and Ancillary Agreements. CVSA was, upon information and belief, committed to using these agreements to provide after-the-fact justification and "legal" cover for the reimbursement payments it had been promised from Genesis for providing open-heart surgery services at the Zanesville Hospital. As its cumulative expenses related to these services continued to grow in 2001, it applied increasing pressure on Dr. McDonnell to sign. CVSA claimed Dr. McDonnell's refusal to sign the Physician Recruitment Agreement, Cognovit Note and other Ancillary Agreements was arbitrary and obstructive, and it repeatedly sought to coerce him into signing.

55. When Dr. McDonnell refused to sign the fraudulent and illegal Physician Recruitment Agreement, the Cognovit Note and other Ancillary Agreements, CVSA retaliated against him by refusing to provide physicians to aid Dr. McDonnell in the coverage of CVSA's responsibility to provide 24/7 coverage of Zanesville Hospital's cardiac services, causing him to work 340 days out of the 365 days in his first year of practice in Zanesville. Further, CVSA revealed to Dr. McDonnell that it did not intend to follow

through with its promise to give him an opportunity to purchase stock in CVSA and share in its profits.

56. Paragraph 13 of Dr. McDonnell's Employment Agreement contemplates that he will be permitted to purchase shares of CVSA and "achieve full parity of stock ownership with the other physicians." Paragraph 13 provides that a decision regarding stock ownership will be made "at the end of the initial thirty six (36) month term of this Agreement." Despite this contractual commitment, in September 2001, CVSA principal Dr. William Watson stated that he never intended Dr. McDonnell to be a full financial partner in the group. Furthermore, although CVSA was based in Columbus and one or more of its representatives had assured Dr. McDonnell before he signed the Employment Agreement that he would have the opportunity to relocate to Columbus if he were to continue with CVSA, he was informed by multiple representatives of CVSA in approximately September 2001 that he would not be able to relocate to Columbus. The foregoing statements constitute anticipatory breach of the Employment Agreement by CVSA.

57. Dr. McDonnell learned in December 2001 that CVSA would be terminating its provision of open-heart surgery services at the Zanesville Hospital on or about year-end 2001.

58. As a direct and proximate result of CVSA's harassment of Dr. McDonnell and attempts to coerce him into signing the Physician Recruitment Agreement, Cognovit Note and Ancillary Agreements, its refusal to provide promised coverage to allow Dr. McDonnell reasonable time off for professional development, personal matters and vacations, its refusal to permit Dr. McDonnell future relocation to Columbus, its premature announcement that Dr. McDonnell would not be considered for financial partnership in CVSA,

and its announced termination of open-heart surgery services at the Zanesville Hospital, CVSA breached the Employment Agreement and constructively terminated Dr. McDonnell's employment. In the face of CVSA's breach and/or constructive termination, and with no other recourse, on January 8, 2002, Dr. McDonnell submitted a letter of resignation.

59. As a direct result of the foregoing constructive termination and breach of the Employment Agreement by CVSA, Dr. McDonnell has suffered lost income and benefits, relocation expenses and other damages substantially in excess of $100,000.

COUNT IV
FRAUD BY GENESIS

60. Dr. McDonnell realleges and incorporates by refcrence as if fully set forth herein Paragraphs 1 - 27, 29 - 38, 40 - 52 and 54 -59 of the Complaint.

61. Months before CVSA extended an offer of employment to Dr. McDonnell, Genesis, either alone or in combination with CVSA, had determined that it would use the Physician Recruitment Agreement to attempt to legitimize its reimbursement payments to CVSA for the open-heart surgery program to be initiated at the Zanesville Hospital and, in furtherance of this objective, would require Dr. McDonnell to sign the Physician Recruitment Agreement, Cognovit Note and Ancillary Agreements.

62. Genesis' intention to require Dr. McDonnell to sign the Physician Recruitment Agreement, Cognovit Note and Ancillary Agreements was a material fact which, if disclosed by Genesis to Dr. McDonnell, would have influenced his

decision as to whether to relocate to Zanesville. Genesis had a duty to disclose to Dr. McDonnell this and any other material information about its plans for the open-heart surgery program, including Genesis' commitment to the Ohio Department of Health to provide 24/7 coverage for cardiac patients and its right to terminate the Exclusive Services Agreement at any time without notice to Dr. McDonnell and without recourse by Dr. McDonnell to the due process protections of the Genesis medical staff bylaws.

63. Genesis' own formal written policies and procedures imposed a duty to disclose the Physician Recruitment Agreement and related documents to Dr. McDonnell at the time of his initial visit to Genesis, which occurred in May 2000. Genesis had prior to this time repeatedly entered into recruitment agreements with physicians it was seeking to add to its medical staff in Zanesville, and it had established formal written policies and procedures for how the agreements should be prepared and presented to physicians considering relocating to Zanesville. Genesis viewed the recruitment agreement as an important part of the overall package offered to induce a physician to come to Zanesville, and it was Genesis' practice, consistent with the explicit terms of its written policies and procedures, to share with the physician on his or her initial visit to Zanesville a draft of the agreement.

64. Genesis knew and understood at least as early as March 2000 that CVSA would enter into an employment agreement with the surgeon recruited for the open-heart surgery program in Zanesville, and it knew when Dr. McDonnell visited Zanesville in May 2000 that Genesis would require him to sign, as well, a physician recruitment agreement. In direct contravention of its written policies and procedures and established practices, and with knowledge that

it would require Dr. McDonnell to sign the Physician Recruitment Agreement and related documents, Genesis not only failed to present a copy of the agreement to Dr. McDonnell when he visited Zanesville in May 2000 but, additionally, Thomas Sieber, President of Genesis, did not even disclose to Dr. McDonnell in a face-to-face meeting during the visit that Genesis would require him to sign the Physician Recruitment Agreement and related documents.

65. Genesis was also under a duty to disclose its intention to require Dr. McDonnell to sign the Physician Recruitment Agreement and related documents by operation of Medicare fraud and abuse laws and regulations. Genesis' written policy on physician recruitment contracts stated that its purpose was to provide an agreement between Genesis and a candidate physician which "complies with all appropriate regulatory agency rules and regulations". Since Genesis intended that the Physician Recruitment Agreement would provide legal cover for its reimbursement payments to CVSA, the Physician Recruitment Agreement had to comply with applicable statutory and regulatory provisions under the Stark Law and Anti-Kickback Law and regulations. To provide a "safe harbor" for payments that would otherwise be prohibited under these statutes, a recruitment contract must actually be instrumental in recruiting a physician to a community and, *a fortiori*, it must be presented to the physician prior to his decision to relocate. Since Genesis' own written policy stated that its purpose was to comply with applicable rules and regulations as to physician recruitment contracts, it was on this ground under a duty to disclose to Dr. McDonnell in advance of his relocation to Zanesville its intention to require him to sign the Physician Recruitment Agreement and related documents.

66. The foregoing duty to disclose that Genesis would require Dr. McDonnell to sign the Physician Recruitment Agreement and related documents was nondelegable, and Genesis could not assign or transfer the duty to CVSA or any other person or entity.

67. Not only did Genesis' own policies and procedures impose a duty on it to disclose its intention to require Dr. McDonnell to sign the Physician Recruitment Agreement and related documents but disclosure was also necessary to dispel the misleading impression, resulting from Genesis' silence, that the only agreement which Dr. McDonnell would be required to sign in relation to his responsibilities for the open-heart surgery program was an employment agreement with CVSA and that the only contractual commitments to which he would be bound were contained in that employment agreement.

68. Before deciding to relocate to Zanesville, Dr. McDonnell was under the impression that he would have reasonable time off if he were to accept the position for the open-heart surgery program at Genesis, and he was under the impression that he would have the full benefit and protection of the Genesis medical staff bylaws if he were granted staff privileges at Genesis. In discussions with Mr. Sieber and other Genesis representatives during his May 2000 meeting, no statements were made to dispel these impressions. Unknown to Dr. McDonnell, Genesis intended to look to Dr. McDonnell to provide the 24/7 coverage for cardiac patients to which Genesis was committed under its filings with the Ohio Department of Health, and, unknown to Dr. McDonnell, Genesis could terminate the Exclusive Services Agreement without notice to Dr. McDonnell and without any recourse by Dr. McDonnell to procedures and remedies otherwise available to medical staff under the Genesis medical

staff bylaws. Genesis was under a duty to disclose these facts to dispel the misleading impressions resulting from its partial disclosure of the facts and circumstances of the open-heart surgery program, but it failed to do so.

69. In connection with consideration of whether to relocate in Zanesville, Dr. McDonnell reposed special trust and confidence in Mr. Sieber and other Genesis representatives with whom he met during his May 2000 visit. He reasonably believed that they had special knowledge and expertise relating to operating a hospital surgical program and administration of a hospital and its various specialties, including cardiologists and anesthesiologists, as well as the planned open-heart surgery program. He trusted and relied upon statements by Mr. Sieber as to the plans for the open-heart surgery program and other matters involving Genesis. Upon information and belief, Mr. Sieber understood, or had reason to understand, that Dr. McDonnell trusted and relied upon his knowledge and expertise and that of Genesis generally on the subject of hospital management and administration, including how the planned open-heart surgery program would be run. The relationship between Dr. McDonnell and Genesis, through Mr. Sieber, was a *de facto* fiduciary relationship, imposing on Genesis a duty to disclose not only its intention to require Dr. McDonnell to sign the Physician Recruitment Agreement and related documents, but also its intention to look to him for satisfaction of its 24/7 coverage commitment and the fact that he would not have the benefit of procedures and remedies available to other staff under the medical staff bylaws in the event Genesis were to terminate the Exclusive Services Agreement.

70. Dr. McDonnell reasonably relied upon Genesis' failure to disclose the foregoing material information in deciding to relocate to Zanesville to commence the open-heart

surgery program at Zanesville Hospital and discontinue consideration of other professional opportunities, and, in reliance upon the failure to disclose, he resigned his commission in the United States Army, gave up his position as Chief of Cardiothoracic Surgery at Walter Reed Army Medical Center and his surgical practice there, terminated consideration of other professional opportunities, purchased a home and moved his wife and three young children to Zanesville.

71. Upon information and belief, Genesis failed to disclose the foregoing material information knowing at the time of the failure to disclose that, if disclosed, the information would have been material to Dr. McDonnell and would have influenced his evaluation of whether to resign his Army commission, quit his job, give up his practice, terminate consideration of other professional opportunities, purchase a residence and relocate his family to Zanesville.

72. But for Genesis' fraudulent failure to disclose material information, Dr. McDonnell would not have resigned his Army commission, quit his job, given up his practice, terminated consideration of other professional opportunities, purchased a residence and relocated his family to Zanesville.

73. The foregoing fraudulent omissions by Genesis were intentional and malicious and made in reckless disregard of the rights of Dr. McDonnell.

74. As a direct result of Genesis' fraudulent omissions, Dr. McDonnell has incurred substantial costs and expenses in excess of $600,000 and sustained other damages.

COUNT V
TORTIOUS INTERFERENCE BY GENESIS WITH DR. MCDONNELL'S EMPLOYMENT RELATIONSHIP

75. Dr. McDonnell realleges and incorporates by reference as if fully set forth herein Paragraphs 1 - 27, 29 - 38, 40 - 52, 54 - 59 and 61 - 74 of the Complaint.

76. Genesis was at all relevant times fully aware that Dr. McDonnell had entered into an employment agreement with CVSA.

77. In furtherance of its agreement with CVSA to use the Physician Recruitment Agreement as the vehicle through which Genesis would reimburse CVSA's expenses in providing open-heart surgery services at the Zanesville Hospital, Genesis conspired with CVSA to pressure Dr. McDonnell to sign the Physician Recruitment Agreement. Genesis' insistence that Dr. McDonnell sign the Physician Recruitment Agreement led directly to strain and tension between Dr. McDonnell and CVSA, including its physician-shareholders, making the performance of his obligations under the Employment Agreement more difficult and burdensome.

78. The foregoing pressure, coercion and intimidation to sign the Physician Recruitment Agreement constituted intentional interference by Genesis with Dr. McDonnell's employment relationship, and the interference was not only intentional but also improper. It was improper because Genesis knew that the Physician Recruitment Agreement was pretextual and fraudulent and knew, or had reason to know, that it would not, even if executed by Dr. McDonnell, fall within a safe harbor under the Anti-Kickback Law, an

exception to the Stark Law or Medicare reassignment provisions. Genesis knew, or had reason to know, that even if Dr. McDonnell had signed the Physician Recruitment Agreement, it would have been ineffective for its announced purpose and that payments made under its cover would have been illegal under federal and state fraud and abuse laws, prohibitions against self-referral and reassignment provisions.

79. Genesis caused the performance of Dr. McDonnell's obligations under the Employment Agreement to be more difficult and burdensome, additionally, by initiating angioplasty procedures at the Zanesville Hospital in January 2001 without the consent of Dr. McDonnell; by failing to provide adequate cardiac anesthesia coverage despite Dr. McDonnell's repeated requests; by failing to provide other qualified support staff for open-heart surgery despite Dr. McDonnell's repeated requests; and by refusing to provide adequate office space. Genesis did so intentionally and with full knowledge of the scope and nature of Dr. McDonnell's employment responsibilities.

80. The foregoing initiation of angioplasty procedures and failures or refusal to act by Genesis constituted intentional interference by Genesis with Dr. McDonnell's employment relationship, and the interference was not only intentional but also improper. It was improper because Genesis knew that its conduct was objected to by Dr. McDonnell and would directly interfere with his performance of his employment responsibilities.

81. Genesis' foregoing conduct and failures or refusal to act eventually effectively prevented Dr. McDonnell from performing his employment responsibilities, and Genesis thereby intentionally and improperly interfered in the employment relationship between Dr. McDonnell and CVSA.

82. Not only did Genesis intentionally and improperly interfere in the performance of Dr. McDonnell's duties under the Employment Agreement, but when Dr. McDonnell refused to sign the Physician Recruitment Agreement, it also intentionally and improperly caused CVSA to constructively discharge Dr. McDonnell and thereby wrongfully terminate or breach the Employment Agreement.

83. Genesis's foregoing intentional and improper interference with Dr. McDonnell's employment relationship and with the Employment Agreement was without privilege or justification.

84. Genesis' interference was malicious, in reckless disregard of the rights of Dr. McDonnell and was specifically intended by Genesis to harm and damage him if he did not acquiesce in its demands.

85. The foregoing intentional and improper interference by Genesis has caused Dr. McDonnell direct pecuniary loss in excess of $1,000,000 from premature termination of the Employment Agreement, lost profits from loss of the opportunity to become a shareholder in CVSA, relocation expenses, loss of reputation and emotional distress.

WHEREFORE, Dr. McDonnell prays for judgment in his favor against CVSA, CVSS and Genesis on the Complaint and that the Court:

a. Award actual damages for CVSA's and Genesis' fraud, including, without limitation, expenses and costs incurred by Dr. McDonnell in reliance upon the fraudulent representations and omissions;

b. Award such damages for CVSA's constructive termination and breach of the Employment Agreement as will fully compensate Dr. McDonnell for the termination and breach;

c. Award Dr. McDonnell damages from CVSA's wrongful discharge in violation of public policy, including back pay, lost benefits, front pay in lieu of reinstatement, lost profits, relocation expenses and compensation for injury to his reputation and emotional distress;

d. Award actual damages for Genesis' tortious interference, including, without limitation, (I) the balance of compensation Dr. McDonnell would have received under the full term of the Employment Agreement but for Genesis' wrongful interference, (ii) profits lost by Dr. McDonnell from having been prevented from becoming a shareholder in CVSA, (iii) expenses and costs incurred by Dr. McDonnell in seeking and accepting other employment and (iv) compensation for injury to his reputation and emotional distress;

e. Award punitive damages on Counts I, II, IV and V in the amount of at least three times actual damages awarded;

f. Award Dr. McDonnell his attorney fees and the costs of this action; and

g. Award all such other further relief, at law or equity, to which Dr. McDonnell may be entitled.

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PLAINTIFF DEMANDS A TRIAL BY JURY AS TO ALL ISSUES TRIABLE OF RIGHT BY A JURY.

By: /s/Thomas J. Collin
Attorney for Plaintiff

APPENDIX K

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

CASE NO. C2 03 0079

[Filed August 9, 2004]

BRYAN E. McDONNELL Plaintiff	)
v.	)
CARDIOTHORACIC & VASCULAR SURGICAL ASSOCIATES, INC. et al. Defendants	)

JUDGE FROST
MAGISTRATE JUDGE KEMP

STIPULATION OF DISMISSAL WITHOUT PREJUDICE OF REMAINING CLAIMS AGAINST GENESIS, CVSA AND CVSS

WHEREAS, by an Order of July 30, 2004 (Doc. No. 164), the Court granted the motion of Genesis Healthcare System ("Genesis") for summary judgment ("First Summary Judgment Order"); and

WHEREAS, by an Order of August 3, 2004 (Doc. No. 165), the Court granted the motion of Cardiothoracic & Vascular Surgical Associates, Inc. and Cardiothoracic & Vascular Surgical Specialists, Inc. (collectively, "CVSA") for summary judgment ("Second Summary Judgment Order");

WHEREAS, by the First Summary Judgment Order and the Second Summary Judgment Order, the Court dismissed with prejudice certain claims advanced by Plaintiff; and

WHEREAS, by this Stipulation, the parties are agreeing to the dismissal without prejudice of all remaining claims by Plaintiff against Genesis and CVSA, pursuant to Rule 41(a)(1), Fed. R. Civ. P.;

NOW, THEREFORE, IT IS HEREBY STIPULATED that:

(1) All claims by Plaintiff against Genesis and CVSA that were not dismissed by the First Summary Judgment Order and the Second Summary Judgment Order are hereby dismissed without prejudice, with each party to bear its or his own costs as to those specific claims;

(2) Nothing herein shall be construed as amending or otherwise modifying the dismissals with prejudice set forth in the First Summary Judgment Order and the Second Summary Judgment Order and the Clerk may issue final judgment in favor of Genesis on the First Summary Judgment Order and in favor of CVSA on the Second Summary Judgment Order;

(3) As to the claims hereby dismissed without prejudice, Plaintiff shall not refile them against (a) Genesis absent reversal or vacation of the First Summary Judgment Order

by this Court, the United States Court of Appeals for the Sixth Circuit or the United States Supreme Court or (b) CVSA absent reversal or vacation of the Second Summary Judgment Order by one of the foregoing courts; and

(4) Until conclusion of any and all appeals in this case, the statute of limitations shall be tolled and not run as to all claims hereby dismissed without prejudice, and, in the event of refiling by Plaintiff of any such claims, they shall be deemed to have been filed, for purposes of the statute of limitations, as of the date of the filing of the original complaint in this action.

Dated: August 6, 2004.

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APPENDIX L

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

CASE NO. C2 03 0079

[Filed August 30, 2004]

BRYAN E. McDONNELL	)
Plaintiff	)
	)
v.	)
	)
CARDIOTHORACIC & VASCULAR	)
SURGICAL ASSOCIATES, INC.,	)
GENESIS HEALTHCARE SYSTEM and	)
CARDIOTHORACIC AND VASCULAR	)
SURGICAL SPECIALISTS, INC.,	)
Defendants	)
	)

JUDGE FROST
MAGISTRATE JUDGE KEMP

NOTICE OF APPEAL

Notice is hereby given that Bryan E. McDonnell, Plaintiff in the above named case, hereby appeals to the United States Court of Appeals for the Sixth Circuit from the District

Court's Opinion and Order of July 30, 2004 granting summary judgment for Genesis Healthcare System ("Genesis") (Doc. No. 164), Opinion and Order of August 3, 2004 granting summary judgment for Cardiothoracic & Vascular Surgical Associates, Inc. ("CVSA") and Cardiothoracic and Vascular Surgical Specialists, Inc. ("CVSS") (Doc. No. 165) and any and all interlocutory rulings relied upon or followed by the District Court in entering summary judgment for Genesis, CVSA and CVSS, including the July 28, 2004 Opinion and Order denying the motion of Plaintiff for partial summary judgment (Doc. No. 162).

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APPENDIX M

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

CASE NO. C2 03 0079

[Filed November 22, 2004]

BRYAN E. McDONNELL	)
Plaintiff	)
	)
v.	)
	)
CARDIOTHORACIC & VASCULAR	)
SURGICAL ASSOCIATES, INC.,	)
GENESIS HEALTHCARE SYSTEM and	)
CARDIOTHORACIC AND VASCULAR	)
SURGICAL SPECIALISTS, INC.,	)
Defendants	)
	)

JUDGE FROST
MAGISTRATE JUDGE KEMP

AMENDED NOTICE OF APPEAL

Notice is hereby given that Bryan E. McDonnell, Plaintiff in the above named case, hereby appeals to the United States Court of Appeals for the Sixth Circuit from the District

Court's Judgment of November 17, 2004 (R. 182), Opinion and Order of July 30, 2004 granting summary judgment for Genesis Healthcare System ("Genesis") (R. 164), Opinion and Order of August 3, 2004 granting summary judgment for Cardiothoracic & Vascular Surgical Associates, Inc. ("CVSA") and Cardiothoracic and Vascular Surgical Specialists, Inc. ("CVSS") (R. 165) and any and all interlocutory rulings relied upon or followed by the District Court in entering summary judgment for Genesis, CVSA and CVSS, including the July 28, 2004 Opinion and Order denying the motion of Plaintiff for partial summary judgment (R. 162).

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APPENDIX N

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 04-4151, -4509

[Filed June 27, 2005]

BRYAN E. MCDONNELL,
Plaintiff-Appellant,

v.

CARDIOTHORACIC & VASCULAR SURGICAL ASSOCIATES, INC., et al.,
Defendants-Appellees.

On Appeal from
The United States District Court
For the Southern District of Ohio

PLAINTIFF-APPELLANT'S REDACTED FINAL BRIEF FOR CONSOLIDATED APPEALS*

* Version of Final Brief with text redactions for confidential information covered by the stipulated protective order filed in district court.

* * *

JURISDICTIONAL STATEMENT

The district court had subject matter jurisdiction in this case pursuant to the diversity statute, 28 U.S.C. §1332(a). Plaintiff, Bryan E. McDonnell, M.D., is, and was at the time the complaint was filed, a citizen of Pennsylvania. All defendants are, and were at the time the complaint was filed, Ohio corporations having their principal places of business in Ohio, and the amount in controversy, exclusive of interest and costs, exceeds, and exceeded at the time the complaint was filed, $75,000.

This Court has appellate jurisdiction pursuant to 28 U.S.C. §1291. The district court granted in part by order of July 30, 2004 (R. 164) the motion of defendant Genesis Healthcare System ("Genesis") for summary judgment, and it granted in part by order of August 3, 2004 (R. 165) the motion of defendants Cardiothoracic & Vascular Surgical Associates, Inc. ("CVSA") and Cardiothoracic and Vascular Surgical Specialists, Inc. ("CVSS") for summary judgment. All parties stipulated by an entry on August 9, 2004 (R. 171) to dismissal of McDonnell's remaining claims without prejudice, and McDonnell filed a notice of appeal on August 30, 2004 (R. 172).

The district court entered judgment (R. 182) on November 17, 2004 for Genesis, CVS and CVSS as to all claims not voluntarily dismissed by McDonnell. McDonnell filed an amended notice of appeal (R. 183) on November 22 from the November 17 judgment entry.

STATEMENT OF ISSUES PRESENTED

1. Whether the district court erred in not holding that Genesis, a hospital owner, and CVSA, a physician group providing heart surgery services to the hospital, had a duty under the Physician Self-Referral Law (42 U.S.C. §1395nn)("Stark Law") and Medicare/Medicaid Anti-Kickback Statute (42 U.S.C. §1320a-7b(b)) to disclose to a physician, McDonnell, in advance of his decision on whether to relocate to the area served by the hospital, that Genesis intended to enter into a recruitment agreement with him to induce him to relocate.

2. Whether the district court erred in holding that, as a matter of law, the payments provided in a recruitment agreement prepared by Genesis for McDonnell did not violate the Stark Law and Anti-Kickback Statute, where:

   (a) Genesis did not recruit McDonnell,

   (b) the payments provided for in the agreement did not induce McDonnell to relocate,

   (c) McDonnell was required to assign the payments to CVSA,

   (d) the payments were solely for the purpose of covering CVSA's expenses in providing surgery services at Genesis' hospital, and

   (e) Genesis refused to pay CVSA's expenses unless McDonnell signed the agreement but then paid CVSA directly for them after he refused to sign.

3. Whether the district court, in granting summary judgment for Genesis on claims of fraud and tortious interference, improperly resolved issues of fact and credibility.

4. Whether the district court, in granting summary judgment for CVSA on claims of fraud and breach of contract, improperly resolved issues of fact and credibility and erred in holding that there was no breach by CVSA of its employment contract with McDonnell.

STATEMENT OF THE CASE

This case is about the failure by Genesis, the owner of a hospital in Zanesville, Ohio, and CVSA, a group of surgeons in Columbus, to disclose to McDonnell that they intended to require him to sign a "recruitment" agreement and a $960,000 cognovit note if he accepted employment with CVSA and moved to Zanesville. When he refused to sign the agreement, note and related documents after he had left his position as chief of cardiothoracic surgery at Walter Reed Army Medical Center in Washington, D.C. and moved to Zanesville, CVSA breached its written employment agreement with him and, in due course, constructively discharged him from employment. The case raises important issues under federal healthcare law, specifically whether a sham physician recruitment agreement can be used to evade the self-referral prohibitions of the Stark Law and the kickback prohibitions of the Anti-Kickback Statute.

McDonnell filed the complaint (R. 1) on January 27, 2003, naming CVSA and Genesis as defendants. Following initial discovery, McDonnell moved for leave to add CVSS as a defendant, and the motion was granted by order of February 22, 2004 (R. 72). In response to a motion by Genesis for judgment on the pleadings, the district court

dismissed McDonnell's fraud claim against Genesis by order of March 15 (R. 82). It thereafter granted McDonnell's motion for partial reconsideration and for leave to file a second amended complaint ("Complaint") by order of April 26 (R. 98), and McDonnell filed the Complaint (R. 99) on April 26.

Following the close of discovery as to all issues other than the liability of CVSS as a successor in interest to CVSA, the parties moved for summary judgment. McDonnell filed a motion for partial summary judgment (R. 101) on April 30, 2004 on the issue of whether the recruitment agreement satisfied the physician recruitment safe harbor under the Anti-Kickback Statute and the corresponding exception to the Stark Law. The district court denied the motion by order of July 28 (R. 162).

Genesis moved for summary judgment on April 30, 2004 (R. 108) as to all issues except one element of McDonnell's tortious interference claim, and the court granted the motion by order of July 30 (R. 164). CVSA and CVSS moved for summary judgment as to all liability claims on May 3 (R. 109), and the court granted the motion in all respects by order of August 3 (R. 165) except as to two elements of McDonnell's fraud claim.

By entry of August 9, 2004 (R. 171), the parties stipulated to dismissal of McDonnell's remaining claims, and McDonnell filed a notice of appeal (R. 172) on August 30. McDonnell moved the district court on November 15 for entry of judgment (R. 180), and the court entered judgment on November 17 (R. 182). McDonnell filed an amended notice of appeal (R. 183) on November 22.

STATEMENT OF FACTS

McDonnell, a board-certified general and cardiothoracic surgeon, was chief of cardiothoracic surgery at Walter Reed Army Medical Center in 1999. (Genesis Ex. 47, Apx. 733). He began actively exploring at this time opportunities for employment in the private sector. (McDonnell 43, Apx. 644).[1] One of the opportunities he considered was a position with CVSA, which was advertising in a professional journal for a surgeon who could head up a new open-heart surgery program planned by Genesis for its hospital in Zanesville. (*Id.* 28, 68-70, Apx. 640, 651-53).

CVSA[2] was an Ohio limited liability corporation, and all of its shareholders were cardiothoracic surgeons practicing at hospitals in Columbus. (R. 121 CVSA Answer ¶2). After receiving McDonnell's response to its advertisement, CVSA contacted McDonnell to discuss employment. The contact was made by Charles R. Bush, M.D., an officer, director and shareholder of CVSA. (McDonnell 68-70, Apx. 651-53). This led to a visit to Ohio by McDonnell in May 2000. (*Id.* 72-76, Apx. 655-59). Bush extended an offer of employment in August on behalf of CVSA (*id.* 86, Apx. 662), and McDonnell, in reliance upon assurances from Bush and other members of CVSA about the terms of employment, including a 36-month period for partnership consideration (*id.* 99-100,

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[1] Deposition testimony will be cited by the last name of the deponent and page of transcript. The corresponding page in which the testimony appears in the Joint Appendix is left blank for this proof brief.

[2] CVSA transferred its assets and business to CVSS as of January 1, 2003. (R. 99 Complaint ¶¶ 5-6, Apx. 111-12). Claims against CVSS are not at issue on this appeal.

Apx. 667-68), discontinued his search for private employment and accepted the offer. McDonnell thereafter received a formal written contract from CVSA, titled "Employment Agreement" (Genesis Ex. 66, Apx. 734), which he signed on September 20, 2000 (McDonnell 288, Apx. 718). He bought a house and moved his wife and three small children to Zanesville in October 2000. (McDonnell 100-01, Apx. 668-69).

The Employment Agreement (Genesis Ex. 66, Apx. 734), written by counsel for CVSA (R. 129 Taylor aff. ¶3, Apx. 410-11),[3] provided for a three-year term with automatic one-year renewals thereafter (§2). Salary was set at $300,000 for the first employment year, $320,000 for the second and $340,000 for the third (§4). The agreement, purporting to contain the complete understanding between the parties (§17), provided that McDonnell would be offered the opportunity to purchase stock in the corporation if, at the end of the three-year initial term, "the employment relationship proves to be mutually satisfactory" (§13).

CVSA had reached agreement in late 1999 to provide the surgeon for the open-heart surgery program planned by Genesis (Sieber 38-39, Apx. 793-94), an Ohio not-for-profit corporation (R. 103 Genesis Answer ¶2), for a hospital it owned and operated in Zanesville, Good Samaritan Hospital ("Hospital"). CVSA was at the time receiving a steady stream of referrals for heart surgery operations from cardiologists at Genesis hospitals. (Bush 17-19, 119-23, Apx. 498-500, 516-20). CVSA and Genesis signed as of August 10, 2000 an Exclusive Services Agreement

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[3] Affidavits in the record will be cited by name of affiant and docket number of the filing of which they are a part.

("Exclusive Services Agreement") (Smith Ex. 8A, Apx. 882) under which CVSA was to be the exclusive provider of open-heart surgery services at the Hospital.

CVSA sought and obtained assurances at the outset from Genesis that Genesis would cover any financial losses that CVSA might sustain in starting up and running the program (Bush 85-87, Apx. 509-11), and Genesis and CVSA reached agreement, which was never memorialized in any writing, that Genesis would reimburse CVSA for losses (*id.*; Madsen 25, 124, Apx. 624, 629). The parties were acutely sensitive to the fact that direct payments for this purpose would be illegal under the self-referral prohibitions of the Stark Law and the kickback prohibitions of the Anti-Kickback Statute (Smith 67-69, Apx. 849-51; Sieber 112-14, Apx. 805-07), and they determined as early as January 2000 to funnel the payments to CVSA through a "physician recruitment agreement" to be signed by whomever CVSA might hire to join the Genesis medical staff (Burns 43-48, Apx. 449-54). Under either law, payments by a hospital to a physician to induce him or her to relocate may fall within a safe harbor or an exception and be lawful.

Counsel for Genesis sent CVSA in March 2000 a draft physician recruitment agreement (Smith 21-23, Apx. 840-42; Smith Ex. 2, Apx. 872), and representatives of Genesis and CVSA communicated about the status of the agreement over the next several months. Although counsel for Genesis was preparing the agreement, Genesis sought and received input from CVSA on its terms. (*Id.* 21-23, 44-45, Apx. 840-42, 844-45).

Even though McDonnell's Employment Agreement provided unconditionally for payment of salary for its three-year term, Genesis promised in the recruitment agreement to

pay McDonnell up to an amount exactly equal to the three-year salary total. (Smith Ex. 15 (Physician Recruitment Agreement §4.1), Apx. 955-56). McDonnell was expected to sign at the same time a separate agreement with CVSA, titled "Agreement of Assignment" (Smith Ex. 15 (Agreement of Assignment), Apx. 973-74), requiring the payments to be assigned in their entirety to CVSA. Even though McDonnell would not retain any payments and they were solely for the benefit of CVSA, he was also required to sign, at the same time, a Cognovit Promissory Note in the amount of $960,000 (Smith Ex. 15 (Cognovit Promissory Note), Apx. 963-66), the three-year salary total in the Employment Agreement. The note would be "retired" in stages each year thereafter on condition that McDonnell remain at the Hospital for at least seven years. (Smith Ex. 15 (Physician Recruitment Agreement §3.5), Apx. 955). For convenience, this package of agreements will be referred to collectively as the "Agreement".

No one told McDonnell about the Agreement. Even though Genesis had a written policy and procedure in place when McDonnell met with its President, Thomas L. Sieber, in May 2000 that required that a physician recruitment agreement be "shared with physician at initial visit" ("Genesis Recruitment Policy") (Burns Ex. 2, Apx.484; Burns 25-27, Apx. 440-42), Genesis made no mention of it. (R. 125 McDonnell aff. ¶8, Apx. 392). Neither did any one from CVSA (R. 129 McDonnell aff. ¶3, Apx. 403), even though CVSA knew before offering McDonnell employment that he would be required to sign the Agreement (Smith 21-23, 44-45, Apx. 840-42, 844-45; Smith Ex. 2, Apx. 872) and even though CVSA representatives had multiple discussions with McDonnell on the subject of employment and related matters before he made a decision to accept employment (R.129 McDonnell aff. ¶¶1, 4, 6, Apx. 402-04).

McDonnell assisted Bush in the first open-heart surgery at the Hospital on October 30, 2000 (Bush 60, Apx. 507; Bush Ex. 18, Apx. 529), and McDonnell thereafter performed multiple operations each week. It was not until early February 2001 that he learned anything about the Agreement, when it was presented for signature. (McDonnell 143, Apx. 682; R. 129 McDonnell aff. ¶3, Apx. 403). Sieber had signed the Agreement months earlier. (Burns 86, Apx. 471).

McDonnell declined to sign the Agreement because, among other reasons, it would require him to remain in Zanesville for at least seven years or face the obligation to repay the balance on the Cognovit Promissory Note. He reported this to Genesis and CVSA representatives at a March 21, 2001 meeting (McDonnell 147, Apx. 686) and heard nothing more about the Agreement until August (R. 129 McDonnell aff. ¶11, Apx. 406-07).

McDonnell would not have accepted employment with CVSA and moved to Zanesville if he had been informed in advance that he would be required to sign the Agreement. (R.125 McDonnell aff. ¶8, Apx. 392; R. 129 McDonnell aff. ¶3, Apx. 403).

Genesis would not pay CVSA for losses in running the open-heart surgery program unless the Agreement were signed, and losses had mounted to some [deletion] by August 2001. (Bush Ex. 28 ¶13, Apx. 532). McDonnell understood that CVSA viewed his refusal to sign the Agreement as the sole obstacle to getting paid. (R. 129 McDonnell aff. ¶14, Apx. 407-08).

CVSA sent the Agreement to McDonnell again in August 2001 and instructed him to sign it. (R. 129 McDonnell aff. ¶¶11-14, Apx. 406-08). Counsel for CVSA,

K. Michael Taylor, told McDonnell's wife that unless McDonnell signed it, "the whole deal is off" (Margaret McDonnell 126, Apx. 774), and McDonnell understood from this point forward that he would be fired if he did not sign (R. 129 McDonnell aff. ¶12, Apx. 407). He declined to sign.

The evidence would show that CVSA retaliated against McDonnell for refusing to sign. He learned for the first time at a September corporation meeting that a key shareholder, William Watson. had no intention of considering him for stock ownership. (*Id.* ¶14, Apx. 407-08). At about the same time, he was also told, contrary to what he had been assured before accepting employment, that he would not be allowed to move to Columbus (McDonnell 112-13, Apx. 673-74), even though this was where all of CVSA's operations and other physicians were based. By mid-December, McDonnell learned that CVSA was pulling out of Zanesville altogether as of year-end 2001 and that he would be left behind. (R. 129 McDonnell aff. ¶16, Apx. 408). Recognizing that CVSA had abandoned the Employment Agreement and that it had constructively terminated his employment, McDonnell gave notice of resignation on January 8, 2002 (McDonnell 222-23, Apx. 703-04) in order to be sure of getting his salary for the 60-day notice period provided in the Employment Agreement.

Even though McDonnell's refusal to sign the Agreement made it impossible for Genesis to funnel payments to CVSA through the Agreement, Genesis found another means by which to make payments to cover CVSA's operating losses. When it became clear in October 2001 that McDonnell would not sign the Agreement even if it were accompanied by a confidential side agreement purporting to insulate him against some of its terms, Genesis and CVSA negotiated an entirely different agreement (Smith 93-96, Apx. 854-57), to which McDonnell was not a party and of which he was not aware,

providing for a lump-sum direct payment of an amount equal to what was to have been paid if the Agreement had been signed. Their so-called Settlement Agreement & Release ("Settlement Agreement") (Smith Ex. 34, Apx. 991), signed on December 21, 2001 (Smith 104-08, Apx. 859-63), purported to resolve disputes between them as to which of them was responsible for the operating losses. Genesis paid on this date to CVSA the [deletion] which it had previously sought to pay using the Agreement. (*Id.* 105-06, 109, Apx. 860-61, 864).

Other facts will be addressed as appropriate in connection with specific sections of the Argument.

SUMMARY OF ARGUMENT

Genesis had a duty under federal law to disclose the Agreement and its terms to McDonnell before he made a decision on whether to relocate to Zanesville. As the hospital seeking to take advantage of the Stark Law exception and Anti-Kickback Statute safe harbor for a physician recruitment agreement, Genesis was under a duty imposed by federal law to tell McDonnell about the payment provided in the Agreement before he had made a decision, since the safe harbor and exception are available, by their terms, only if remuneration is made in order *to induce the physician to relocate*. It was error for the district court not to hold that there was a duty. (Count IV).

It was error for the district court to hold, as a matter of law, that the payment provided in the Agreement did not violate the Stark Law and Anti-Kickback Statute. Since the Agreement was not disclosed to McDonnell before he made his relocation decision and played no role in the decision, insistence by Genesis and CVSA that he sign it anyway, *after*

he had moved to Zanesville -- the functional equivalent of bait and switch -- (a) evidences a purpose to violate federal law, especially where, as here, Genesis made the payments directly to CVSA after McDonnell refused to sign, and (b) would support an inference that the Agreement was a sham and fraudulent. (Count II).

In holding that CVSA did not breach the Employment Agreement by forcing McDonnell to sign the Agreement, the district court erred in holding that the terms of a contract terminable at will can be unilaterally ignored or repudiated by a party without liability. (Count III).

In entering summary judgment for Genesis on McDonnell's claims for tortious interference (Count V) and for CVSA on his claims for fraud (Count I), wrongful discharge in violation of public policy (Count II) and breach of contract (Count III), the district court erred by resolving issues of fact and credibility against McDonnell.

ARGUMENT

I. The District Court Erred in not Holding that Genesis had a Duty under Federal Law to Disclose to McDonnell, in Advance of his Decision on Whether to Relocate, the Fact and Terms of the Agreement.

This Court reviews an order granting summary judgment for defendants or order denying summary judgment to plaintiff *de novo* using the same summary judgment test as the district court.[4]

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[4] *E.g., Alkire v. Irving,* 330 F.3d 802, 809 (6th Cir. 2003).

The district court held that Genesis was under no duty to disclose the Agreement or its terms to McDonnell, and it entered summary judgment for Genesis on Count IV, alleging fraudulent nondisclosure. (R. 164 op. 6-12, Apx. 161-67).[5] The holding conflicts with Medicare fraud and abuse laws, and it constitutes error.[6]

McDonnell argued in his brief in opposition to the Genesis motion that the Stark Law and Anti-Kickback Statute impose a duty to disclose a physician recruitment agreement and its terms. (R. 124 McDonnell mem. 10-12, Apx. 384-86). The district court did not consider the argument, and it was error not to do so. If it had, it would have concluded that federal law imposes a duty.

Payments by a hospital to a physician or group of physicians in return for referrals of patients may violate the Stark Law or Anti-Kickback Statute, or both. Genesis and CVSA knew this,[7] and they determined even before beginning

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[5] The district court's opinions will be cited by docket number and page of opinion.

[6] The district court also held that there was no duty of disclosure under Ohio law, and we show at pp. 39-46 below that this was error.

[7] The district court observed in its opinion denying McDonnell's motion for partial summary judgment that "neither Genesis nor CVSA dispute that they knew it would be illegal [under the Anti-Kickback Statute] for Genesis to provide remuneration to CVSA for operating expenses in return for referrals". (R. 162 op. 16 , Apx. 151). Sieber, President of Genesis, testified that payments by Genesis to CVSA for its services at the Hospital would be "contrary to Stark and Medicare regulations" unless they were made via a physician recruitment agreement. (Sieber 112-14, Apx. 805-07).

the surgery program at the Hospital that Genesis would make payments for CVSA by means of a recognized exception to the Stark Law and safe harbor under the Anti-Kickback statute, *i.e.*, a physician recruitment agreement. (Burns 43-52, Apx. 449-58).

Stark Law. The Stark Law[8] prohibits a physician from making a referral to an entity for health services for which Medicare pays if the physician has a financial relationship with that entity:

> ...[I]f a physician...has a financial relationship with an entity specified in paragraph (2), then –
>
> > (A) the physician may not make a referral to the entity for the furnishing of designated health services for which payment otherwise may be made under this subchapter....

(42 U.S.C. §1395nn(a)(1))(Addendum 1). A "designated health service" includes hospital in-patient and out-patient services. (§1395nn(h)(6)(K)). Liability is strict; it does not turn upon whether the referral was made with wrongful intent.[9]

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[8] Section 1877 of the Social Security Act (42 U.S.C. §1395nn).

[9] *See* 42 U.S.C. §1395nn(g)(4)(civil liability exists for a physician or entity that enters into an arrangement or scheme "which the physician or entity knows or *should know* has a principal purpose of assuring referrals" in violation of statute)(emphasis added). The Office of Inspector General of the Office of the Secretary of the Department of Health and Human Services noted, in comments published in the March 26, 2003 *Federal Register* on regulations on physician referrals, that liability under the Stark Law does not

Even though the Stark Law categorically bars payments by a hospital to a physician or practice group with which it has a financial relationship, there are some narrow statutory exceptions, and one of them is for recruitment of a physician. This is the exception that Genesis and CVSA relied upon.

The Stark Law excepts payments made by a hospital to induce a physician to relocate to the area served by the hospital, if made in compliance with the statute. A physician recruitment agreement falls within this exception under the following limited circumstances:

> In the case of remuneration which is provided by a hospital to a physician *to induce the physician to relocate to the geographic area served by the hospital* in order to be a member of the medical staff of the hospital, [the compensation arrangement is not prohibited] if –
>
> (A) the physician is not required to refer patients to the hospital,

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depend upon intent:

> The physician self-referral prohibition is implicated in nearly every financial relationship between and among physicians and entities that furnish DHS [designated healthcare services]. Violations of the law (*regardless of the intent of the parties*) have substantial financial consequences....Given the scope and *strict liability nature of the prohibition* and the significant financial consequences of non-compliance , the industry has asked for "bright-line rules"....

69 Fed. Reg. 16120, 16126 (emphasis added).

> (B) the amount of the remuneration under the arrangement is not determined in a manner that takes into account (directly or indirectly) the volume or value of any referrals by the referring physician, and
>
> (C) the arrangement meets such other requirements as the Secretary may impose by regulation as needed to protect against program or patient abuse.

(42 U.S.C. §1395nn(e)(5) (emphasis added))(Addendum 2). The related regulation applicable in 2000 required the arrangement and its terms to be reduced to a writing signed by the parties. (42 C.F.R. §411.357(e)(1)).

The exception is available, by its terms, only if the remuneration provided by the hospital to the physician is offered "to induce the physician to relocate". By negative implication, if the physician does not know about the remuneration before making a decision, the "renumeration" cannot possibly "induce" relocation. Disclosure *before the decision is made* is therefore required in order to comply with the statute.

Anti-Kickback Statute. Similarly, disclosure is required if a physician recruitment agreement is to satisfy the safe harbor under the Anti-Kickback Statute. Section 1128B(b) of the Social Security Act (42 U.S.C. §1320a-7b(b)), the Anti-Kickback Statute, makes it a felony to knowingly and willfully solicit, receive, offer or pay any remuneration to induce referrals of services reimbursable by federal health care programs, including Medicare.[10]

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[10] The Anti-Kickback Statute provides in pertinent part as follows:

> (1) Whoever knowingly and willfully solicits or receives any remuneration (including any kickback, bribe, or rebate)

Not all such payments are illegal, however. The Department of Health and Human Services has issued regulations which specifically exclude from the definition of "remuneration" (42 U.S.C. §1320a-7b(b)) certain types of payments. One is payment made by a hospital in order to induce a physician to relocate. This corresponds to the physician recruitment exception under the Stark Law, already discussed. The safe harbor regulation provides in pertinent part as follows:

> As used in section 1128B of the Act, "remuneration" does not include any payment or exchange of anything of value by an entity in order *to induce a practitioner*

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directly or indirectly, overtly or covertly, in cash or in kind --

(A) in return for referring an individual to a person for the furnishing or arranging for the furnishing of any item or service for which payment may be made in whole or in part under a Federal health care program...

***

shall be guilty of a felony....

(2) Whoever knowingly and willfully offers or pays any remuneration (including any kickback, bribe, or rebate) directly or indirectly, overtly or covertly, in cash or in kind to any person to induce such person --

(A) to refer an individual to a person for the furnishing or arranging for the furnishing of any item or service for which payment may be made in whole or in part under a Federal health care program...

***

shall be guilty of a felony....

42 U.S.C. §§1320a-7b(b)(1), (2)(Addendum 3).

> ... *to relocate, his or her primary place of practice into a HPSA* [Health Professional Shortage Area] for his or her specialty area, as defined in Departmental regulations, that is served by the entity, as long as all of the following nine standards are met –
>
> (1) The arrangement is set forth in a written agreement signed by the parties that specifies the benefits provided by the entity, the terms under which the benefits are to be provided, and the obligations of each party....

(42 C.F.R. §1001.952(n)(emphasis added))(Addendum 4).

In common with the Stark Law exception, the Anti-Kickback Statute safe harbor applies, by its terms, only if the remuneration is made to a physician to "induce" him or her to relocate. Without disclosure before the decision to relocate is made, there can be no inducement, and the safe harbor necessarily requires prior disclosure.

Genesis did not disclose the Agreement. From the outset, Genesis and CVSA were committed to using the Agreement to "legitimize" payments to cover CVSA's losses. There is no dispute that McDonnell had been told nothing about the Agreement or its terms until long after he had made his decision to relocate.[11] Keeping a recruitment agreement

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[11] Genesis readily acknowledges that the Recruitment Agreement was not disclosed before McDonnell made his relocation decision: "*...[L]et us begin by stating the obvious: Genesis did not disclose the existence of the Physician Recruitment Agreement prior to the start of Plaintiff's employment with CVSA....*" (R. 138 Genesis mem. 6 (emphasis added), Apx. 413). See also McDonnell 143-48, Apx. 682-87; R. 125 McDonnell aff. ¶3, Apx. 391.

secret from the physician, as it was here, removes it from the protection of the Stark Law exception and the Anti-Kickback Statute safe harbor. If the exception and safe harbor were to be properly invoked by Genesis, it had a duty under federal law to disclose the payment terms of the Agreement *before* McDonnell had made a decision on relocation, and it was error for the district court not to so hold. This Court should therefore reverse the district court's grant of summary judgment for Genesis on Count IV.

II. The District Court Erred in Holding, as a Matter of Law, that the Payment Provided in the Agreement Did Not Violate the Stark Law and Anti-Kickback Statute.

This Court reviews an order granting or denying a motion for summary judgment *de novo*.[12]

In ruling on Count II, alleging wrongful discharge by CVSA in violation of public policy, the district court held that the Stark Law and Anti-Kickback Statute evidence a clear public policy to prohibit "abusive self-referrals and kickbacks in the healthcare industry" (R. 165 op. 17, Apx. 199), but it held that McDonnell could not establish that CVSA violated public policy by allegedly constructively discharging him for failure to sign the Agreement. It held that the claim was barred because the Agreement was, in the court's view, "legal under both the Stark Law and the Anti-Kickback Statute". (*Id.* at 18).

The court erred in holding that, as a matter of law, the Agreement complied with both the Stark Law and the Anti-Kickback Statute. The remuneration promised in the

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[12] *See* note 4 above.

Agreement does not fall within the physician recruitment exception under the Stark Law and constitutes a violation of the Stark Law. The district court correctly held that the remuneration does not fall within the physician recruitment safe harbor under the Anti-Kickback Statute, but it committed error in holding that, as a matter of law, there could be no violation of the Anti-Kickback Statute. We address the court's errors in order.

A. The remuneration provided in the Agreement did not fall within the physician recruitment exception of the Stark Law.

The Stark Law exception for physician recruitment requires (pp. 17-18 *supra*) that the remuneration in question "induce" a physician to relocate. The Agreement does not satisfy the exception. It is undisputed that it played no role in inducing McDonnell to relocate (since he was totally unaware of its existence) and was not in a writing signed by the parties.

The district court held that since Genesis had in the Agreement guaranteed the salary of McDonnell,[13] the remuneration was, however, an inducement to McDonnell to relocate:

> Clearly, it is the remuneration, not the PRA [*i.e.*, Agreement] itself, that is the inducement. And, under the PRA, Genesis guaranteed McDonnell's salary. As

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[13] The Agreement provided at §4.1 that Genesis would "guarantee" McDonnell a "minimum annual Professional Income" which, coincidentally, exactly matched his annual salary under the Employment Agreement with CVSA. (Smith Ex. 15 (Physician Recruitment Agreement §4.1), Apx. 955-56).

> such, the Court holds that had McDonnell signed the PRA, the PRA would have satisfied the requirements for the physician recruitment exception under the Stark Law.

(R. 162 op. 11, Apx. 146). The Genesis income guarantee does not satisfy the statute, and the court's error comes from *assuming* that McDonnell was induced to relocate by it. There is no record support for the assumption, and there could be none.

It is undisputed that McDonnell knew nothing about the Agreement, including the income guarantee, before February 2001. There is no evidence, nor could there be, that CVSA told him before then that Genesis would guarantee this salary. The Employment Agreement (Genesis Ex. 66, Apx. 734) provided unconditionally for payment by CVSA of a salary (§4), and McDonnell, thus, had no possible need for any Genesis guarantee.

The only remuneration of which McDonnell was aware -- the salary promised in the Employment Agreement -- was not "remuneration which is *provided by a hospital* to a physician to induce the physician to relocate" (42 U.S.C. §1395nn(e)(5) (emphasis added)), as the Stark Law exception states. It was remuneration provided by a physician group, not by a hospital, and the exception has no application.

B. The remuneration provided in the Agreement was in violation of the Stark Law.

The Stark Law (p. 16 *supra*) prohibits a physician or physician group from making referrals to a hospital with which the physician or group has a "financial relationship". (42 U.S.C. §1395nn(a)(1)). CVSA had a financial

relationship with Genesis falling squarely within the prohibition -- *i.e.*, Genesis would pay CVSA for any shortfall between CVSA's expenses in running the open-heart surgery program and receipts from patient billings -- and there is no dispute that CVSA made referrals to Genesis. As Sieber testified, once Genesis had started the program, it contemplated that physicians would refer patients needing heart surgery to Zanesville instead of Columbus hospitals (Sieber 82-83, Apx. 800-01), and there is no dispute that CVSA did.

Any payment by Genesis to CVSA or one of its employees, such as McDonnell, would therefore constitute a prohibited payment under the Stark Law, and Sieber explicitly acknowledged this fact in his deposition.[14] Since the Agreement and its payment provisions did not fall within the exception for recruitment agreements, payments would not be protected even if made pursuant to the Agreement.

C. The remuneration provided in the Agreement did not fall within the physician recruitment safe harbor of the Anti-Kickback Statute.

The Anti-Kickback Statute safe harbor for recruitment agreements (p. 19 *supra*) is available only if an agreement "precisely meets all of the conditions" listed in the safe harbor rule,[15] and the district court so held. (R. 162 op. 14, Apx. 149). Genesis and CVSA acknowledged that the Agreement did not satisfy all of the conditions listed in the rule (*id.*), and the district court held, correctly, that the

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[14] *See* note 7 above.

[15] Office of Inspector General Advisory Opinion No. 01-4 at 5 (May 10, 2001) ("OIG Advisory Opinion")(Addendum 5).

Agreement would not, even if signed, satisfy the safe harbor (*id.*)

D. The remuneration provided in the Agreement was in violation of the Anti-Kickback Statute.

Since the safe harbor is not available, whether the payments provided in the Agreement fall within the prohibition of the Anti-Kickback Statute is a question of fact. There is evidence in the record from which a jury could find that the payments fall within the prohibition, and it was error for the district court to hold that, as a matter of law, there was no "knowing" or "willful" conduct by Genesis and CVSA within the scope of the statute. (*Id.* 16-18, Apx. 151-53).

The district court did not address whether the remuneration in the Agreement would fall within the scope of the Anti-Kickback Statute. It assumed as much and focused analysis, instead, on whether Genesis and CVSA had knowingly and willfully engaged in conduct in violation of the statute. (*Id.* at 16). A brief description of the payment arrangement between Genesis and CVSA will provide some context for the district court's holding and aid in understanding why it is error.

As Bush, the head of CVSA in 1990-2000, explained, without a promise by Genesis to reimburse CVSA for losses, CVSA would not have agreed to provide surgical services at the Hospital. (Bush 85-87, Apx. 509-11). Without the open-heart surgery program, patients in the Zanesville area would have continued to travel to Columbus-area hospitals for heart surgery, including Riverside Hospital (Sieber 83, Apx. 801), where CVSA already provided heart surgery services (Bush 17-19, Apx. 498-500). Sieber described Genesis'

objective in making sure that heart surgery patients were referred to the Hospital instead of a hospital in Columbus, including Riverside:

> A: ...What we are trying to do is, obviously, entice people who live in our market area to use the Genesis Heart Services for heart services.
> Q: Instead of going to Riverside in Columbus or OSU or Mount Carmel in Columbus, correct?
> A: That's correct.

(Sieber 83, Apx. 801).

Under §7.1 of the Exclusive Services Agreement (Smith Ex. 8A, Apx. 882), CVSA directly billed patients and received payment either from the patient or a third-party payor, *i.e.*, a private insurance carrier or Medicare. The reimbursement arrangement between Genesis and CVSA -- the metaphorical frosting on the financial cake -- augmented CVSA's income from patient billings and provided far in excess of what private insurers and Medicare were paying.[16]

Supplemental payments such as these are prohibited under the Anti-Kickback Statute, and the Office of the Inspector General ("OIG") of the Office of the Secretary of the Department of Health and Human Services specifically identified this type of payment as a "suspect incentive

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[16] For the 12-month period October 2000 through September 2001, CVSA's total receipts from patients or third-party payors, including Medicare, were $290,622 (Madsen Ex. 19, Apx. 632-33). Total expenses allocable to the Zanesville program -- including physician and staff salaries, malpractice insurance premiums and other costs -- were $588,784, leaving a difference of $298,162 to be paid by Genesis. (*Id.*)

arrangement" in a December 19, 1994 Federal Register notice, "Special Fraud Alerts". Among arrangements identified as violations of the Anti-Kickback Statute are *"[g]uarantees which provide that, if the physician's income fails to reach a predetermined level, the hospital will supplement the remainder up to a certain amount"*. (59 Fed. Reg. 65372, 65376 (emphasis added))(Addendum 6).

Genesis was under no legal obligation whatsoever to reimburse CVSA for "losses". Hospitals are not insurers of physician income, and the inference logically follows that payments were promised by Genesis to keep CVSA referring patients and to dissuade it from treating them at another facility -- *i.e.*, they were an inducement to refer patients in direct violation of the Anti-Kickback Statute. Even if Genesis had multiple motives in making the payments and inducing referrals was only one, the payments would nonetheless violate the statute.[17]

1. There is evidence in the record from which a factfinder could find knowing and willful conduct of Genesis or CVSA, or both, in violation of the Anti-Kickback Statute.

The district court held that the record was devoid of evidence of any knowing or willful offer or payment of remuneration to induce referrals. (R. 162 op. 16-18, Apx. 151-53). The record is actually replete with evidence, both direct and circumstantial, indicating or supporting an inference that the conduct of Genesis and CVSA was knowing and willful. Whether Genesis or CVSA, or both of them,

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[17] *See, e.g., United States v. LaHue*, 261 F.3d 993, 103-04 (10th Cir. 2001), *cert. denied*, 534 U.S. 1083 (2002).

"knowingly and willfully" offered, paid, received or solicited any remuneration to induce referrals is a question of fact.

The district court considered two divergent standards for evaluating whether the intent component of the Anti-Kickback Statute were satisfied. Citing *Hanlester Network v. Shalala*,[18] it noted that proof of a violation required evidence that the defendant knew that the Anti-Kickback Statute prohibited offering or paying remuneration to induce referrals and, despite this knowledge, engaged in prohibited conduct with a specific intent to disobey the law. (R. 162 op. 16, Apx. 151). Citing *United States v. Neufeld*,[19] the court held, alternatively, that a violation is established if the evidence shows that the defendant had a "purpose to commit a wrongful act".[20] The district court held that, under either formulation, there was a total failure of proof. (R. 162 op. 16-18, Apx. 151-53). The court was wrong.

The court ruled that, as a matter of law, Genesis and CVSA "proceeded in good faith" in working on the Agreement and therefore lacked a specific intent to violate the statute. (*Id.* at 17). The conclusion is based solely on the facts that (1) the attorney for Genesis who drafted the Agreement, Karen D. Smith, stated in an affidavit that she believed that it comported with the law (*id.*) and (2) David W. Grauer, an attorney engaged by McDonnell in August 2001 after the Agreement had been tendered to him a second time

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[18] 51 F.3d 1390 (9th Cir. 1995).

[19] 908 F. Supp. 491 (S.D. Ohio 1995).

[20] *Id.* at 497.

for execution, stated in his deposition that he believed that counsel for Genesis and CVSA were proceeding in good faith (*id.*)

These two record references have no bearing upon the intent of Genesis or CVSA. First, Grauer's testimony says nothing about their intent. It speaks only to his perception of how the lawyers were proceeding, and it is undisputed that he had no knowledge of any of the background facts relating to preparation of the Agreement, much less any information about the Genesis Recruitment Policy and its disclosure requirements. (R. 125 Grauer aff. ¶¶4-7, Apx. 388). Second, the self-serving Smith affidavit likewise says nothing about her client's intent and conflicts with an array of evidence, all of which the district court ignored, indicating something other than good faith.

In holding that there was good faith as a matter of law, the court overlooked or disregarded a constellation of record facts evidencing or supporting an inference of *bad faith*.

First, Genesis' attempt to hide behind a sham physician recruitment agreement was improper since, as Genesis has readily acknowledged (Sieber Ex. 1 at 1, Apx. 829), *Genesis did not recruit McDonnell.*

Second, even if Genesis were properly a party to the Agreement, it is undisputed that the Agreement and its terms, including payment, played no role in McDonnell's decision to relocate. Contrary to its title and purpose, the Agreement *served no recruitment function* and was false on its face in stating otherwise.

Third, even though CVSA and Genesis knew as early as January 2000 that they would use a recruitment agreement

(Burns 43-48, Apx. 449-54); even though Genesis had completed a draft by March 2000 (Smith 21-23, Apx. 840-42); and even though Genesis had a formal written policy requiring disclosure of a recruitment agreement to a physician candidate at the first interview (Burns Ex. 2, Apx. 484) -- no mention was made of any use of a recruitment agreement to McDonnell at any time during the recruitment process.

Fourth, even though Genesis did not recruit McDonnell and remuneration in the Agreement did not induce him to relocate, Genesis and CVSA continued to negotiate, between themselves and unbeknownst to McDonnell, the terms of the Agreement even *after* McDonnell had relocated and begun performing surgeries at the Hospital. (Smith 44-45, 48-49, Apx. 844-45, 846-47; Smith Ex. 11, 13, Apx. 919, 924).

Fifth, even though the Agreement had been completely drafted by the end of November 2000 (Smith 48-49, Apx. 846-47), it was not disclosed to McDonnell until more than two months later, in early February 2001 (McDonnell 143, Apx. 682; R. 129 McDonnell aff. ¶3, Apx. 403).

Sixth, the Agreement conflicts by its terms with the Employment Agreement (p. 9 *supra*) and, if signed, would have superseded the unconditional promise of salary payments in the Employment Agreement (§4).

Seventh, CVSA necessarily knew at the time it tendered the Employment Agreement to McDonnell for signature in September 2000 that he would be required to sign the Agreement of Assignment as part of the physician recruitment agreement package (p. 9 *supra*) and that the Employment Agreement falsely stated in its integration clause (§17) that it contained the *entire agreement* between the parties.

Eighth, even though McDonnell stated to Genesis and CVSA in March 2001 that he would not sign the Agreement, they ignored him, engaged in further secret negotiations about it and tendered it again to him for signature in August 2001 (pp. 10-11 *supra*).

Ninth, when McDonnell continued to refuse to sign the Agreement in August 2001, CVSA made it known that *he would be fired if he persisted in refusing to sign* (R. 129 McDonnel aff. ¶12, Apx. 407) -- even though his Employment Agreement provided unconditionally for payment of salary and other benefits over a three-year term. There was nothing in the Agreement that was of any benefit to McDonnell, and he had nothing to gain -- except saving his job -- by signing it.

Tenth, when McDonnell continued to refuse to sign the Agreement, *Genesis paid CVSA directly for its operating losses*. (Smith Ex. 34, Apx. 991, 993). Since the Agreement was not valid, the payments made to CVSA were purely and simply kickbacks.

The district court thus erred in concluding, as a matter of law, that there had been no intent on the part of Genesis and CVSA to violate the Anti-Kickback Statute. In doing so, the court ignored the basic principle that, on a motion for summary judgment, the opposing party's "version of any disputed issue of fact...is presumed correct"[21] and all justifiable inferences are to be drawn in favor of the evidence

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[21] *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451, 456 (1992).

presented by the opposing party.[22] The court is not to make credibility determinations.[23]

The Supreme Court noted in *Hunt v. Cromartie,*[24] in considering whether state legislation establishing boundaries for a congressional district was racially motivated, that "motivation is itself a factual question".[25] The Court held that it was error for the district court to have resolved disputed issues of fact as to motivation on summary judgment,[26] but that, of course, is exactly what the district court did here -- *i.e.*, it resolved disputed issues of fact in favor of a finding that Genesis and CVSA had no wrongful intent.

2. There is evidence in the record from which a factfinder could find that one purpose of the payments in the Agreement was to induce referrals.

The district court also stated that there was nothing in the record to indicate that any purpose of the Agreement was to induce CVSA to make referrals (R. 162 op. 17, Apx. 152), commenting that McDonnell offered "nothing more than mere

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[22] *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

[23] *E.g., Carter v. University of Toledo*, 349 F.3d 269, 276 (6th Cir. 2003) ("a credibility determination...must be resolved by the factfinder, not by the court as a matter of law").

[24] 526 U.S. 541 (1999).

[25] *Id.* at 549.

[26] *Id.* at 552.

speculation". The court ignored evidence that would support an inference that there was such a purpose.

An advisory opinion by the OIG on whether a physician recruitment agreement may violate the Anti-Kickback Statute notes that payment by a hospital to a physician in exchange for relocating supports an inference that one purpose of the payment is to generate referrals which fall within the prohibitions of the Anti-Kickback Statute:

> ...[S]uch arrangements may be unlawful under the anti-kickback statute. When a hospital provides remuneration to a physician in exchange for relocating or establishing his or her medical practice within the hospital's service area, *an inference may be drawn that one purpose of the remuneration is to generate referrals for the hospital,* including referrals of Federal health care program beneficiaries [*i.e.*, Medicare patients].[27]

Grounds for the inference are powerfully reinforced when payments to be made by the hospital are intended for a physician (McDonnell) being hired by a practice group (CVSA) which already has a referral relationship with the hospital and the payments are for the benefit of the practice group. The Agreement of Assignment (Smith Ex. 15 (Agreement of Assignment), Apx. 973-74) was intended to deliver to CVSA *all* payments made to McDonnell by Genesis, and there was never even any attempt by Genesis to conceal the fact that all payments would go into CVSA's pocket and were solely for its benefit.

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[27] OIG Advisory Opinion at 7 (emphasis added) (Addendum 5).

In the draft Supplemental Compliance Program Guidance for Hospitals, published on June 8, 2004 in the *Federal Register* (69 Fed. Reg. 32012), the OIG specifically considered how an arrangement such as this, called a joint recruitment arrangement, can violate the Anti-Kickback Statute, and the text underscores the fraud and abuse inherent in the Genesis-CVSA scheme to funnel payments to CVSA via a bogus recruitment agreement:

> Many hospitals provide incentives to recruit a physician or other health care professional to join the hospital's medical staff and provide medical services to the surrounding community ....*[R]ecruitment arrangements pose substantial fraud and abuse risk.*
>
> ***
>
> Because of the significant risk of fraud and abuse posed by improper recruitment arrangements, hospitals should scrutinize these arrangements with care. . . .
>
> ***
>
> Significantly, hospitals should be aware that the practitioner recruitment safe harbor does not protect "joint recruitment" arrangements between hospitals and other entities or individuals, such as solo practitioners, group practices, or managed care organizations, pursuant to which the hospital makes payments directly or indirectly to the other entity or individual. *These joint recruitment arrangements present a high risk of fraud and abuse and have been the subject of recent government investigations and prosecutions.* These arrangements can easily be used as vehicles to disguise payments from the hospital to an existing referral source - typically an existing physician practice - in exchange for the existing practice's referrals to the hospital. *Suspect payments*

> *to existing referral sources may include, among other things, income guarantees that shift costs from the existing referral source to the recruitment physician and overhead and build-out costs funded for the benefit of the existing referral source. Hospitals should review all "joint recruiting" arrangements to ensure that remuneration does not inure in whole or in part to the benefit of any party other than the recruited physician.*

(69 Fed. Reg. 32022-23 (June 8, 2004)) (footnotes omitted; emphasis added) (Addendum 7).

The scheme in which Genesis and CVSA participated was not even a true joint recruiting arrangement which would, under the best of circumstances, be subject to heightened scrutiny for fraud and abuse under the above OIG guidelines. Genesis did not have to make any promise of remuneration, much less an income guarantee, to induce McDonnell to relocate. By its own admission (Sieber Ex. 1, Apx. 829), Genesis played no role in recruiting McDonnell, and its efforts to invoke the recruitment safe harbor under the Anti-Kickback Statute are transparently pretextual. The only thing "joint" about the arrangement between Genesis and CVSA relating to recruiting was that they both agreed that *Genesis would try to make it appear that promised payments to CVSA were for the purpose of recruiting McDonnell.*

Since the Agreement of Assignment provided that every penny paid by Genesis to McDonnell went directly to CVSA, the payment arrangement falls squarely within the conduct condemned by the OIG. The arrangement guaranteed exactly what the OIG warns against: "Hospitals should review all 'joint recruiting' arrangements to ensure that *remuneration*

does not inure in whole or in part to the benefit of any party other than the recruited physician" (emphasis added).[28]

3. There is evidence in the record from which a factfinder could find that the Agreement was a sham.

Since the Agreement played no role in McDonnell's decision to relocate, it was, by definition, ineffective for its stated purpose. Genesis and CVSA nonetheless insisted that McDonnell sign it, and their insistence highlights the fact that payments provided in the Agreement were necessarily for some purpose unrelated to recruitment. If they were not for recruiting McDonnell, the Agreement was necessarily a sham. The most compelling evidence that the Agreement was a sham is the fact that the payments it provided for were made by Genesis directly to CVSA *after they had both abandoned it*. If the Agreement had in fact been intended by Genesis for its stated purpose -- inducing McDonnell to relocate -- Genesis would have been freed from any need to make payments once McDonnell had relocated, as he did, without any reliance on the Agreement.

As of August 2001 -- a full year after McDonnell had decided to relocate -- CVSA claimed that it was owed some [deletion] from Genesis, and CVSA expected that

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[28] The potential for fraud and abuse in these arrangements is underscored by the indictment of Tenet Health System Hospitals, Inc. and one of its hospitals for using physician recruitment agreements to funnel money to practice groups to induce referrals. *United States v. Weinbaum et al.*, No. 03CR1587L (S.D. Cal., July 17, 2003). The July 17, 2003 press release of the United States Attorney for the Southern District of California and indictment are reproduced in Addendum 8.

McDonnell's signing the Agreement "will give us the [deletion] Genesis owes us". (Bush Ex. 28 ¶13, Apx. 532). When efforts to force his signing were unsuccessful, Genesis and CVSA turned, instead, to the Settlement Agreement. CVSA finally got its money by this means in December 2001, and CVSA acknowledges that the reason for the Genesis payment was to cover CVSA's losses in performing services at the Hospital under the Exclusive Services Agreement:

> [Payment was made] to reimburse CVSA for losses associated with the failure of the thoracic program to fully comply with the initial contractual expectations of the parties under the Exclusive Services Agreement.

(R. 145 CVSA mem. 16, Apx. 429). The December 2001 payment of [deletion] thus had nothing to do with costs incurred in connection with recruiting McDonnell.

Additional evidence that the Agreement was a sham comes from looking at what "costs of recruitment" Genesis promised to pay. The income guarantee in the Agreement (Smith Ex. 15 (Physician Recruitment Agreement §4), Apx. 955-59) would have, if the Agreement had been signed by McDonnell, obligated Genesis to reimburse CVSA not just for McDonnell's salary, but for virtually all expenses associated with operation of the Zanesville open-heart surgery program.

Genesis described the income guarantee as covering "certain practice start-up costs" (R. 143 Genesis mem. 18, Apx. 415), but the facts show that Genesis had, actually, given CVSA a virtual insurance policy, holding it harmless from and against *all losses* in connection with the Zanesville program. Neil Madsen, CVSA's accountant, confirmed in February 2004 -- some three and one-half years after initiation

of the program -- that Genesis had covered *all* losses: "We received reimbursement to cover those losses...." (Madsen 25, 124, Apx. 624, 629). Genesis paid CVSA [deletion] in December 2001 pursuant to the Settlement Agreement (Smith 105-07, Apx. 860-62; Smith Ex. 34 (§4), Apx. 993), and it thereafter paid nearly [deletion] more directly to CVSA and its successor in interest, CVSS, for a total of [deletion] through August 2003[29] -- long after McDonnell had not only been "recruited" to Zanesville but had also left there.

* * *

[29] The record references for this total are detailed at page 8 in the memorandum in support of McDonnell's motion for partial summary judgment. (R. 106 McDonnell mem. 8, Apx. 250).

CONCLUSION

The Court should reverse the district court's July 30, 2004 order (R. 164) and remand this case for trial on the merits on McDonnell's claims against Genesis. It should reverse the court's March 15, 2004 order (R. 82) to the extent that it holds that the Complaint states no claim against Genesis in Count V for tortious interference in the Employment Agreement and McDonnell's employment relationship with CVSA.

The Court should reverse the district court's August 3, 2004 order (R. 165) and remand this case for trial on the merits on McDonnell's claims against CVSA.

The Court should reverse the district court's July 28, 2004 order (R. 162) denying McDonnell's motion for partial summary judgment and enter summary judgment for McDonnell to the effect that the Agreement does not satisfy the physician recruitment safe harbor under the Anti-Kickback Statute and the physician recruitment exception to the Stark Law.

Respectfully submitted,

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APPENDIX O

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 04-4509

[Filed June 24, 2005]

BRYAN E. MCDONNELL,
Plaintiff-Appellant,

v.

CARDIOTHORACIC & VASCULAR SURGICAL ASSOCIATES, INC., et al.,
Defendants-Appellees.

On Appeal from
The United States District Court
For the Southern District of Ohio

FINAL BRIEF OF DEFENDANT APPELLEE
GENESIS HEALTHCARE SYSTEM

* * *

[p.27]

3. Federal Law Did Not Impose A Duty To Disclose.

Finally, McDonnell also declares that Federal law imposed a duty upon Genesis and this duty was supposedly nondelegable, even though he acknowledges that the PRA was a mechanism for payment to CVSA and it was CVSA, not Genesis, that conducted all recruiting, as expected under Section 1.2 of the [p.28] Exclusive Services Agreement. There is, quite frankly, no support for McDonnell's claim that this function is nondelegable.[9]

* * *

CONCLUSION

For these reasons, the District Court's July 30, 2004, Opinion and Order dismissing McDonnell's claims against Genesis should be affirmed.

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[9] No expert or lay testimony is offered in this respect. In fact, McDonnell's own counsel testified that an arrangement in which the payment is made to the practice group, not the physician, is very common. Burns, of course, testified that this task is delegated to a physician group when the group undertakes the recruiting.

Respectfully submitted,

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APPENDIX P

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 04-4151, -4509

[Filed June 27, 2005]

BRYAN E. MCDONNELL,	)
Plaintiff-Appellant,	)
	)
v.	)
	)
CARDIOTHORACIC & VASCULAR SURGICAL ASSOCIATES, INC., et al.,	)
Defendants-Appellees.	)
	)

On Appeal from
The United States District Court
For the Southern District of Ohio

PLAINTIFF-APPELLANT'S FINAL REPLY BRIEF FOR CONSOLIDATED APPEALS

* * *

A. The District Court Erred in not Holding that Genesis had a Duty under Federal Law to Disclose the Agreement.

As we show in our main brief, a hospital seeking to take advantage of the physician recruitment exception to the Stark Law (42 U.S.C. §1395nn(e)(5)) and the corresponding safe harbor under the Anti-Kickback Statute (42 C.F.R. §1001.952(n)) must show that the payments provided for in the recruitment agreement actually *induced* the physician to relocate. (Brief 14-20).[1] Without this showing, the recruitment agreement is, by definition, illusory. Where, as here, the agreement and its terms were not disclosed to the physician until *after* he was recruited and had actually relocated, any argument that the agreement served its intended purpose – *i.e.*, recruitment – fails.

Genesis does not dispute this self-evident proposition. It attempts to side-step it by stating that CVSA did the recruiting, not Genesis. (Genesis 27).[2] It contends that the duty to disclose therefore fell on CVSA.

The district court stated in its ruling on McDonnell's motion for reconsideration and for leave to file a second amended complaint (R. 84) that "such duty [to disclose] is non-delegable". (R. 98 op. 3, Apx. 236). Even if Genesis were to dismiss this as simply the court's characterization of

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[1] References to McDonnell's main brief on appeal will be cited as "Brief __".

[2] References to Genesis' appellate brief will be cited as "Genesis __".

McDonnell's arguments, it points to no legal authority for delegation, and it points to no evidence that it had delegated this acknowledged duty to CVSA.

The reason it cites no legal authority is obvious. There is none. Nowhere in the Stark Law or Anti-Kickback Statute or regulations is there even a hint that a hospital's duty to disclose can be handed off to a third party.

The reason Genesis cites no evidence in the record is also obvious. There is none. Genesis at no time gave any instructions to CVSA that it was to disclose the Agreement and its terms to McDonnell. Bush, the CVSA principal, stated that it was his understanding that Burns at Genesis "would make arrangements" for presenting the Agreement to McDonnell (R. 109 Bush aff. ¶¶13, 14, Apx. 377), and Genesis' own written policy on physician recruitment agreements stated that Genesis, not somebody else, would tell a candidate about the agreement. (Burns Ex.2, Apx. 484).

Even if Genesis' dubious contention were accepted that McDonnell was not told about the Agreement because of an innocent "lapse in communication" (Genesis 15), the delegation argument is not advanced. On the contrary, if there was a "lapse", there was, *a fortiori,* no delegation. Nor can it seriously be maintained, in any event, that compliance with federal law can be excused by simply pointing to a "lapse in communication".

Genesis' "lapse" story does not change the inconvenient fact that the Agreement was prepared by counsel for Genesis (Smith 41, Apx. 843), not CVSA, and that she forwarded execution copies *to Burns* on November 28, 2000 with instructions that McDonnell should sign them. (Smith Ex. 15, Apx. 952). Despite the fact that Burns was clearly directed

to have the documents signed, he did nothing. Instead of delegation of the duty of disclosure, the facts point to shared concealment by Genesis and CVSA.

* * *

III. Conclusion.

McDonnell respectfully requests that the Court reverse the judgment of the district court and grant the relief requested in the Conclusion of the main brief.

Respectfully submitted,

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APPENDIX Q

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 04-4151, -4509

[Filed February 9, 2006]

BRYAN E. MCDONNELL,	)
Plaintiff-Appellant,	)
	)
v.	)
	)
CARDIOTHORACIC & VASCULAR SURGICAL ASSOCIATES, INC., et al.,	)
Defendants-Appellees.	)
	)

On Appeal from
The United States District Court
For the Southern District of Ohio

PLAINTIFF-APPELLANT'S PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

* * *

Plaintiff-appellant, Bryan E. McDonnell, respectfully petitions the Court, pursuant to Rules 35 and 40, Fed. R. App. P., for rehearing *en banc* of the Order entered January 31, 2006 ("Order") affirming the judgments of the district court which are the subject of these consolidated appeals. A copy of the Order accompanies this Petition.

INTRODUCTION

This proceeding involves questions of exceptional importance. The first question is procedural: Whether this Court can affirm a judgment on the basis of a district court's ruling without reaching a dispositive issue properly raised on appeal but not decided in the district court. The Court has a duty to decide dispositive issues properly raised and briefed, and failure to do so effectively deprives the appellant of access to the courts without due process. The Panel in this case failed to address McDonnell's first issue on appeal -- whether there is a duty under Medicare fraud and abuse laws to disclose a physician recruitment agreement to the physician being recruited -- even though it was fully briefed and argued. By affirming solely on the basis of the district court's rulings, the Panel necessarily overlooked and failed to decide this dispositive issue.

The second question is substantive: Whether Medicare fraud and abuse laws, intended by Congress to prevent fraudulent and abusive payments and financial arrangements between hospitals and physicians, can be circumvented by use of a sham, after-the-fact physician recruitment agreement. Here, the defendants -- Genesis Healthcare System ("Genesis"), a hospital owner, and Cardiothoracic & Vascular Surgical Associates, Inc. ("CVSA"), a physician group --

used a physician recruitment agreement to provide cover for payments otherwise unlawful under the fraud and abuse laws. Even though McDonnell was the physician purportedly "recruited" by means of the agreement, he was never told about it and had no idea about its onerous terms until long after he had relocated from Maryland to Ohio. The Panel, relying solely on the district court's analysis, failed to consider whether federal law imposes a duty to disclose a recruitment agreement and the implications of concealment.

ARGUMENT

I. The Panel Effectively Denied McDonnell Appellate Review by Failing to Decide Whether a Hospital Has a Duty under Federal Law to Disclose the Fact and Terms of a Physician Recruitment Agreement.

The Panel affirmed the lower court rulings on the "grounds identified by the district court". (Order at 4). McDonnell's leading issue on this appeal -- that federal law imposes a duty to disclose the facts of terms of a physician recruitment agreement -- was not, however, discussed by the district court. (Main Brief at 15).[1] The issue was raised by McDonnell in the district court (*id.*) and was fully briefed before this Court (*id.* at 14-21; Genesis Brief at 27-28; Reply Brief at 2-4), but the Panel necessarily did not consider it because it affirmed *solely* on the basis of the district court rulings. This Court has a duty to decide dispositive issues properly raised on appeal, and failure to do so conflicts with

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[1] References to McDonnell's Final Brief for Consolidated Appeals will be cited as "Main Brief at __". His Reply Brief for Consolidated Appeals will be cited as "Reply Brief at __".

due process and effectively denies an appellant access to the Court.

While the Court may affirm a judgment on grounds different from those relied upon by the district court, where, as here, the Panel has relied expressly and solely on the district court's analysis, there can be no debate about the grounds for decision. Those grounds *did not include* any consideration of McDonnell's leading issue on appeal, because the district court itself failed to address the issue.

By not deciding the issue, the Panel failed to consider a fundamentally important threshold question about proper use of physician recruitment agreements, which are used extensively by hospitals in securing the services of new physicians.[2] If it had considered the issue, the district court's judgment would have been reversed, because, as McDonnell showed in his briefs before this Court, the fact of, and remuneration provided in, a physician recruitment agreement *must* be disclosed to a physician in advance of the physician making a decision to relocate. (Main Brief at 14-21; Reply Brief at 2-4). The Stark Law exception for such an agreement explicitly states that remuneration is excepted from the statute if it is provided by a hospital "to induce the physician to relocate". (42 U.S.C. §1395nn(e)(5), quoted in Main Brief at 17). The Anti-Kickback Statute safe harbor applies, similarly, only if remuneration is offered or made "to induce a practitioner . . . to relocate". (42 C.F.R. §1001.952(n), quoted in Main Brief at 19).

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[2] See Main Brief at 34-36 on the widespread use of these agreements.

It is conceded by Genesis that there was no disclosure (Main Brief at 20, n. 11), and its silence has important consequences. When the silence is coupled with the plain text of the Stark Law exception and Anti-Kickback Statute safe harbor, only one conclusion is possible: the recruitment agreement which Genesis and CVSA sought to force McDonnell to sign was not only false on its face but also could not function as a recruitment agreement. It served no "recruiting" function whatsoever, and calling it a "Recruitment Agreement" does not change this. Foisting it on McDonnell months after he had relocated and insisting that he sign it or "the whole deal is off" (*id.* at 11) cast in sharp relief the plain fact that it was a sham, intended to provide cover for referral payments otherwise proscribed by the Stark Law and Anti-Kickback Statute.

Proper use of a physician recruitment agreement is a matter of special concern under the fraud and abuse laws because remuneration paid by a hospital to a physician under a properly drawn and implemented agreement is shielded from the Anti-Kickback Statute's prohibition of payments in exchange for referrals or, in the case of the Stark Law, payments to a practice group with which a hospital has a financial relationship. (Main Brief at 14-21). When a hospital provides remuneration to a physician in return for the physician relocating, pursuant to a recruitment agreement, the Office of Inspector General of the Office of the Secretary of the Department of Health and Human Services has noted that "an inference may be drawn that *one purpose of the remuneration is to generate referrals for the hospital*" (Office of Inspector General Advisory Opinion No. 01-04 at 7 (May 10, 2001) (emphasis added), quoted in Main Brief at 34-35), and payment for referrals is unlawful.

McDonnell prominently raised the issue of the need to disclose a physician recruitment agreement, but the Panel necessarily ignored it. It is the first issue in the Statement of Issues Presented:

> Whether the district court erred in not holding that Genesis, a hospital owner, and CVSA, a physician group providing heart surgery services to the hospital, had a duty under the Physician Self-Referral Law . . . and Medicare/Medicaid Anti-Kickback Statute . . . to disclose to a physician, McDonnell, in advance of his decision on whether to relocate to the area served by the hospital, that Genesis intended to enter into a recruitment agreement with him to induce him to relocate.

(Main Brief at 2). By deciding the appeal solely on the basis of the district court's rulings, the Panel failed to reach this issue. McDonnell respectfully requests that the Order be vacated and that the Court address and decide the issue.

II. The Panel Misapprehended Law and Facts Material to McDonnell's Claims and Overlooked Evidence in the Record that Genesis Intended the Physician Recruitment Agreement as a Device to Evade Prohibitions of the Stark Law and Anti-Kickback Statute.

The Panel's description of McDonnell's claim against Genesis for tortious interference (Order at 3) contains errors of law and fact which point to a fundamental misunderstanding of the law and record evidence. If the Panel had correctly viewed the law and evidence in the record, it would have concluded, it is submitted, that summary judgment should not have been entered.

First, the Panel erroneously states that McDonnell contends that Genesis interfered with his contractual relationship with CVSA "by refusing to remit payments to CVSA according to an Exclusive Services Agreement between CVSA and Genesis". (*Id.*) In fact, the Exclusive Services Agreement has no provision of any kind for payment of CVSA by Genesis, and McDonnell has never contended otherwise. (Main Brief at 25-27). The Exclusive Services Agreement gave CVSA the exclusive right to provide cardiothoracic surgical services at Genesis hospitals, but it has no provision for payment or reimbursement of CVSA by Genesis. (*Id.*; Reply Brief at 24-25). There is, thus, no basis for any statement that Genesis could have paid CVSA anything pursuant or according to the Exclusive Services Agreement.

The absence of any payment obligation in the Exclusive Services Agreement is crucially important, because it underscores the fact that any understanding or agreement between Genesis and CVSA for reimbursement of expenses *must be found elsewhere.* As the record shows, and as the district court ignored, CVSA had been promised at the outset that Genesis would pay CVSA whatever was needed to cover all of its losses (Main Brief at 7-8, 25-26; Reply Brief at 11-12), and it in fact honored the promise (Main Brief at 7-8; Reply Brief at 11-12). Since Genesis paid CVSA the amount it claimed it was due for losses in running the open-heart surgery program at the Zanesville hospital *even after McDonnell had refused to sign the recruitment agreement,* the inference is inescapable that the recruitment agreement was a sham. (Main Brief at 36-37). Entirely separate from the fact that, as noted above at page 4, it served no recruiting function and was false on its face, the expenses that it purported to justify reimbursing necessarily had nothing to do with

recruiting but were simply operating losses of CVSA. (*Id.* at 38-39).

Second, the Panel erroneously repeats the district court's holding that it would have been illegal "for Genesis to pay CVSA without the PRA". (Order at 3) This implies that a signed recruitment agreement would have permitted Genesis to pay CVSA, and this also reflects a fundamental misapprehension of the law and McDonnell's arguments. A signed recruitment agreement would have enabled Genesis to pay McDonnell, *not CVSA*. The parties to the physician recruitment agreement were Genesis and McDonnell (Main Brief at 8-9), and the Office of Inspector General of the Office of the Secretary of the Department of Health and Human Services has made it clear that hospital payments to a practice group, as opposed to the individual physician being recruited, raise grave issues under the Anti-Kickback Statute:

> . . . [A]rrangements [between hospitals and group practices for recruiting] can easily be used as vehicles to disguise payments from the hospital to an existing referral source -- typically an existing physician practice -- in exchange for the existing practice's referrals to the hospital.

(69 Fed. Reg. 32022-23 (June 8, 2004), quoted in Main Brief at 35). Even with a signed recruitment agreement, Genesis would not, therefore, have been able to make payments lawfully to CVSA. Since Genesis made the payments even after it had abandoned the recruitment agreement (Main Brief at 36-37), there was, *a fortiori,* no lawful basis for the payments.

If the Panel had viewed the law and record evidence discussed in McDonnell's briefs instead of relying on the

district court analysis, it would have necessarily concluded, it is submitted, that there is evidence in the record from which a reasonable juror could find that one of Genesis' purposes in using the recruitment agreement and seeking to force McDonnell to sign it was to evade the prohibitions of the Stark Law and Anti-Kickback Statute. (Main Brief at 29-33). As the Supreme Court emphasized in *Hunt v. Cromartie,* 526 U.S. 541, 549, 552 (1999), motivation is a question of fact, and it was reversible error for the district court to enter summary judgment for Genesis on this issue. (Main Brief at 32-33).

The Panel, thus, fundamentally misapprehended facts material to McDonnell's claim of interference, and it repeated the district court's erroneous statement of the law in affirming summary judgment for Genesis. McDonnell respectfully requests that the Order be vacated and that the Court reverse the judgment on the grounds detailed in McDonnell's main and reply briefs.

CONCLUSION

It is undisputed that McDonnell would not have accepted employment with CVSA and relocated to Ohio if he had been informed of the fact and terms of the physician recruitment agreement before he had made the decision to accept employment. By failing to address McDonnell's contention that federal law imposes a duty of disclosure in advance of any decision by a physician on whether to relocate, the Panel not only deprived McDonnell of appellate review on an issue fundamentally important under the Medicare fraud and abuse laws, but it also effectively ratified the conduct at issue in this case -- *i.e.*, use of an after-the-fact, secret "recruitment" agreement to evade the abusive referral prohibitions of the Anti-Kickback Statute and Stark Law. McDonnell

respectfully submits that the Order be vacated and that the appeal be reheard.

Respectfully submitted,

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APPENDIX R

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

No. 03-CR-1587-L

[Filed March 9, 2005]

UNITED STATES OF AMERICA, Plaintiff,	)
v.	)
BARRY WEINBAUM; TENET HEALTHSYSTEM HOSPITALS, INC.; and ALVARADO HOSPITAL MEDICAL CENTER, INC., Defendants.	)

ORDER

1) DENYING DEFENDANT WEINBAUM'S MOTION FOR JUDGMENT OF ACQUITTAL;

2) DENYING IN PART AND GRANTING IN PART DEFENDANT TENET HEALTHSYSTEM HOSPITALS, INC.'S MOTION FOR JUDGMENT OF ACQUITTAL UNDER RULE 29 OF THE RULES OF CRIMINAL PROCEDURE; and

3) ENTERING JUDGMENT OF ACQUITTAL AS TO COUNTS 16 AND 17 OF THE FOURTH SUPERSEDING INDICTMENT.

[Doc. Nos. 703, 708]

Defendants Barry Weinbaum and Tenet Healthsystem Hospitals Inc. ("THHI") both filed motions for judgment of acquittal at the close of the Government's case pursuant to Rule 29(a) of the Federal Rules of Criminal Procedure. Defendant Alvarado Hospital Medical Center, Inc. ("Alvarado") has joined in Defendants' motions.

The Court orally denied a portion of Defendant Weinbaum's motion[1] prior to closing arguments, but took under submission Defendants' remaining claims regarding the

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[1] At a hearing on February 1, 2005, the Court rejected Defendant Weinbaum's contention that a required element of proof under the Anti-kickback statute is proof of an increase in costs to Medicare and MediCal programs. Financial harm to a federal program is not an element of the Anti-kickback statute. Although the reason for enacting the statute was to prevent drains on the public fisc, the statute does not require that there be a drain on the public fisc in order for payments to be illegal. *United States v. Bay State Ambulance and Hospital Rental Service, Inc.*, 874 F.2d 20, 33 n. 21 (1st Cir. 1989). Congress is within its prerogative to protect spending objects and it maintains the power to keep a watchful eye on expenditures and the reliability of those who use public money, even in the absence of an actual loss of federal funds. *See United States v. Sabri*, 541 U.S. 600, 124 S.Ct. 1941, 1947 (2004). Accordingly, to the extent it has not already done so, the Court denies Defendant Weinbaum's constitutional challenge to the Anti-kickback statute and finds that Congress's enactment of the statute is proper under the Spending Clause, both facially and as applied in this case.

insufficiency of the evidence presented at trial. The Court has now fully considered the submissions of the parties and concludes that the Government's proof as to Counts 1 through 15 and 18 through 20 of the Fourth Superseding Indictment is sufficient to withstand challenge under Rule 29. The Court concludes, however, that the Government's evidence with respect to Counts 16 and 17 of the Fourth Superseding Indictment is insufficient to establish the essential elements of the offenses alleged therein. Accordingly, all Defendants will be acquitted of those counts.

Background

Defendants are charged in Count 1 of the Fourth Superseding Indictment with conspiring to offer and pay illegal remunerations in violation 18 U.S.C. § 371 and 42 U.S.C. § 1320a-7b(b), the Medicare Anti-kickback statute.[2]

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[2] Count 1 of the Fourth Superseding Indictment charges Defendants with conspiracy to commit violations of both 42 U.S.C. § 1320a-7b(b)(1), which prohibits the solicitation and receipt of remunerations, and 42 U.S.C. § 1320a-7b(b)(2), which prohibits the offering or paying of illegal remunerations. The Court, however, instructed the jury only with respect to the 42 U.S.C. § 1320a-7b(b)(2) "offering or paying" offense as it conformed to the Government's theory and the evidence adduced at trial; that is, that the Defendants' alleged violations of the Anti-kickback statute stemmed from the payment of monies to physicians through relocation agreements. However, the Court did not preclude the Government from arguing the existence of a conspiracy between one of the Defendants and another person outside of the Alvarado Hospital entities. The Court found that the fact that the Defendants allegedly conspired to pay remunerations in violation of subsection (b)(2) of the Anti-kickback statute did not necessarily exclude persons on the receiving end of the remuneration from being part of the underlying agreement to violate subsection (b)(2).

Defendants are charged in Counts 2 through 20 with substantive offenses of offering and paying remunerations in violation of subsection (2)(A) of the Anti-kickback statute. This section makes it a felony to:

> knowingly and willfully offer[] or pay[] any remuneration (including any kickback, bribe, or rebate) directly or indirectly, overtly or covertly, in cash in or in kind to any person to induce such person—
>
> A) to refer an individual to a person for the furnishing or arranging for the furnishing of any item or service for which payment may be made in whole or in part under a Federal health care program

42 U.S.C § 1320a-7b(b)(2)(A).

Trial commenced on October 19, 2004. After more than three months of testimony, the Government rested its case on January 26, 2005. Broadly summarized, the evidence presented at trial established that between the years of 1992 and 2004, Defendant Alvarado, through its CEO, Defendant Weinbaum, entered into nearly 100 physician relocation agreements to bring new physicians into the Alvarado Hospital service area. The relocation agreements typically provided the new "relocated" physician a monthly salary guarantee and a monthly guarantee for overhead expenses.

The Government's evidence established that the relocation agreements were used to bring relocated physicians into practices that already existed within the Alvarado Hospital service area, the "host" practice or physician. In addition to providing guaranteed salary and overhead to the relocated physicians, the relocation agreements also provided "host"

practices with funds for tenant improvements and equipment purchases necessary to accommodate the relocated physicians.

Certain evidence presented by the Government indicated that the relocation agreements were offered by Defendants primarily to benefit the existing host physician, rather than the relocated physicians. For example, relocation agreements were often negotiated entirely between hospital representatives and the host physician and were signed by the relocated physician, at times even back-dated, only after the final agreement had been reached. Evidence also established that in some instances the relocated physicians were not able to draw enough business to be able to maintain a viable practice upon the expiration of the salary guarantee. Yet, even in these situations, Defendants entered into subsequent relocation agreements to bring other physicians into the same host practice.

The Government's evidence further established that in most instances, portions of the Hospital's payments to the relocated physicians were subsequently paid over by the relocated physician to the host practice, at times in accordance with a separate arrangement negotiated between the relocated physician and host physician. Under these side arrangements between the relocated physician and host, the relocated physician would often receive only a portion of the total monthly income and overhead guarantees established under the relocation agreements. For example, Dr. Ver Hoeve, a host physician, testified that he would receive all of the $12,000 per month overhead allotments allocated under relocation agreements to the relocated physicians brought into his practice, even though Dr. Ver Hoeve acknowledged that the new physicians utilized very little resources.

Evidence tended to indicate that the Hospital was aware of these side arrangements, or at a minimum, that it became aware of them when certain doctors disputed Hospital efforts to recover monies paid under relocation agreements that were breached by the relocated physician. For example, Dr. Ver Hoeve's testimony indicated that during discussions with Defendant Nazaryan[3] leading up to particular relocation agreements, he was led to understand that the monthly overhead provision in the final contract between the Hospital and the relocated doctor would be paid to Dr. Ver Hoeve. In at least one instance, when the Hospital became aware that one of these side deals required a host physician to indemnify a relocated physician, the Hospital simply forgave the debt.

The Government's evidence also suggested that the monies paid under the relocation agreements to the host physicians were often excessive or over-stated. For example, certain tenant improvements claimed by the host physicians were not actually undertaken or certain claimed equipment was not actually purchased. In addition, testimony established that monthly rent and overhead expenses charged to relocated physicians by the hosts would drastically decrease once the Hospital's payments under the relocation agreement ended.

The primary theory of culpability presented at trial was that Defendants violated the Anti-kickback statute by using the relocation agreements to pay monies to the host physicians with the intent to induce them to refer patients to Alvarado Hospital. Defendants maintained, on the other hand, that the relocation agreements were perfectly legal and conformed

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[3] Defendant Nazaryan began trial as a seated defendant, but entered a plea agreement with the Government in the course of trial that resulted in her testifying against the remaining defendants.

with industry standards and practices. Defendants disputed the existence of criminal intent and established that each relocation agreement contained an explicit provision recognizing that payments under the agreement were not conditioned upon the referral of patients to the Hospital. Defendants also established through testifying physicians that the physicians' medical judgment was not influenced by relocation agreements and that the physicians were not pressured to refer patients to the Hospital.

At the close of the Government's case, Defendants exercised their right not to present evidence and rested. The matter was submitted to the jury and, after five days of deliberations, a mistrial was declared due to the jury's inability to reach a unanimous verdict.

Discussion

Under Rule 29(a) of the Rules of Criminal Procedure, the Court "must enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction." Fed. R. Crim. P. 29(a). A motion for judgment of acquittal is reviewed on a sufficiency-of-the-evidence standard. *United States v. Stoddard,* 150 F.3d 1140, 1144 (9th Cir. 1998). Under that standard, evidence supports a conviction, if, viewed in the light most favorable to the Government, it would allow any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *Id.*

The essential elements of the crime of offering and paying remunerations under the Anti-kickback statute are: (1) the knowing and willful offer or payment of any remuneration (2) with the intent to induce any person to refer an individual for the furnishing of an item or service (3) for which payment may be made in whole or in part under a Federal health care

program. 42 U.S.C. § 1320a-7b(b)(2)(A). Prior to trial, the parties disputed whether the jury should be instructed that the statute is violated if "one purpose" of the remuneration was to obtain patient referrals, or instead, whether the statute requires a *quid pro quo*. After extensive briefing, the Court found that it was bound by the two Ninth Circuit cases discussing the Anti-kickback statute, *United States v. Kats,* 871 F.2d 105 (9th Cir. 1989), which adopted a "one material purpose" test, and *Hanlester Network v. Shalala,* 51 F.3d 1390 (9th Cir. 1995), which held that proof of an agreement is not required to establish a violation of the statute and discussed the inducement element of the offense. With a modification to incorporate the "one-purpose rule" adopted by the Ninth Circuit in *Kats,* this Court ultimately adopted the instruction given by the district court in *United States v. Anderson,* 85 F.Supp. 2d 1047 (D. Kan. 1999), *reversed on other grounds, United States v. McClatchey,* 217 F.3d 823 (10th Cir. 2000). Thus, with respect to the inducement element of the Anti-kickback violation, the jury was instructed as follows:

> In order to sustain its burden of proof against the defendants for the crime of violating the Anti-Kickback statute, the government must prove beyond a reasonable doubt that the defendant under consideration offered or paid remuneration with the specific criminal intent "to induce" referrals. To offer or pay remuneration to induce referrals means to offer or pay remuneration with the intent to gain influence over the reason or judgment of a person making referral decisions. The intent to gain such influence must have been one material purpose for which the remuneration was offered or paid.

On the other hand, the defendants cannot be convicted merely because they hoped or expected or believed that referrals may ensue from remuneration that was designed wholly for other purposes. Likewise, mere oral encouragement to refer patients or the mere creation of an attractive place to which patients can be referred does not violate the law. There must be an offer or payment of remuneration to induce, as I have just defined it.

I. Count 1 Conspiracy

Defendant THHI contends that the Government's proof of the conspiracy alleged in Count 1 fails for lack of proof of the elements of "inducement" and "willfulness." Defendant THHI further argues that inducement may not be found absent proof of an attempt to influence a physician's medical judgment and may not be established by an intent to grow admissions. Defendant THHI maintains that willfulness cannot be established by violations of internal corporate policies nor was it sufficiently established by Defendant Nazaryan's testimony. Defendant THHI also argues that a finding of willfulness is precluded by evidence that Defendants relied upon the advice of counsel and that they acted in accordance with the belief of the health care industry that relocation agreements are legal and appropriate. Defendant Weinbaum contends that the Government's proof of the conspiracy fails for lack of proof of an agreement.

A. Inducement

Defendant THHI maintains that in order to prove the element of "inducement" under the Anti-kickback statute, the Government must establish that payments were made with the intent to influence a physician's medical judgment. Defendant

THHI argues that the Government has introduced no evidence indicating that any relocation agreement affected or was intended to affect a physician's medical judgment. In support of its position, Defendant THHI points out that each of the physicians called as witnesses testified unequivocally that they knew they were under no obligation to admit any patients to Alvarado Hospital and were not pressured to admit patients to the Hospital. Defendant THHI maintains that even the testimony of the two cooperating witnesses, Defendant Nazaryan and Dr. Ver Hoeve, failed to provide evidence of an intent to compromise the medical judgment of any physician. For example, Dr. Ver Hoeve testified that even though he admitted more patients to Alvarado Hospital because of relocation agreements, his medical judgment was never compromised.

The phrase "to induce" in 42 U.S.C. § 1320a-7b(b)(2) has been defined by the Ninth Circuit as "an intent to exercise influence over the reason or judgment of another in an effort to cause the referral of program-related business." *Hanlester,* 51 F.3d at 1398. Consistent with this definition, this Court instructed the jury that "[t]o offer or pay remuneration to induce referrals means to offer or pay remuneration with the intent to gain influence over the reason or judgment of a person making referral decisions." Neither the plain language of the statute nor any cited decision supports Defendant THHI's construction that the intent to influence the medical judgment of a physician is required to establish a violation of the Anti-kickback statute. To the contrary, both the explicit terms of 42 U.S.C. § 1320a-7b(b)(2)(A) ("to induce such person – to refer an individual to a person...") and controlling Ninth Circuit authority, *see Hanlester,* establish that the required proof regarding inducement hinges upon a showing of intent to influence the judgment of a person making referral decisions. *See also United States v. Jain,* 93

F.3d 436 (8th Cir. 1996), *cert. denied,* 520 U.S. 1273 (1997) (affirming physician's Anti-kickback statute conviction despite evidence demonstrating that the physician provided quality services and did not compromise any patient's care).

Defendant THHI cites *Kats, Hanlester,* and *United States v. Greber,* 760 F.2d 68 (3rd Cir. 1989) in support of its position that an Anti-kickback statute violation must be based upon a finding that the defendant influenced a care giver's medical judgment. None of these decisions are persuasive. In *Hanlester,* as noted above, the Ninth Circuit adopted the Secretary of the Department of Health and Human Services' determination that the phrase "to induce" in § 1320a-7b(b)(2) connotes "an intent to exercise influence over the reason or judgment of another *in an effort to cause the referral* of program-related business." 51 F.3d at 1398 (emphasis added).

Hanlester arose after the Department of Health and Human Services initiated administrative proceedings against a general partnership, individual investors, and their joint ventures ("appellants") alleging they had violated the Anti-kickback statute by offering physicians limited partnership interests in clinical laboratories as illegal inducements for patient referrals. *Hanlester,* 51 F.3d at 1395. After an adverse finding at the administrative level, the appellants appealed to the district court for the Central District of California. *Id.* at 1395-96. On appeal to the Ninth Circuit, appellants argued that the term "induce" is synonymous with "to encourage," and that encouragement is not prohibited by the statute. The court agreed that mere encouragement is not sufficient to violate the Anti-kickback statute, but disagreed that the terms "inducement" and "encouragement" are synonymous. The court adopted the definition of inducement cited above and concluded that "the fact that a large number of referrals resulted in the potential for a high return on investment, or

that the practical effect of low referral rates was failure for the labs" was insufficient proof of an intent to induce referrals. The court, however, found sufficient proof of an intent to induce referrals based upon the conduct of a non-party, Patricia Hitchcock, to affirm the judgments against certain appellants on a vicarious liability theory:

> ... Ms. Hitchcock implied that eligibility to purchase shares depended on an agreement to refer program-related business; told prospective limited partners that the number of shares they would be permitted to purchase in PPCL, Omni, and Placer would depend on the volume of business that they referred to the labs; and stated that partners who did not refer business would be pressured to leave the partnerships. Hitchcock also told potential investors that the partners' return on their investment would be virtually guaranteed. Hitchcock's representations to limited partners constitutes offers of payment to induce referrals of program-related business.

Id. at 1399. Defendant THHI points to this conduct in support of its position that proof of influence over a care-giver's medical judgment is required to establish a violation of the Anti-kickback statute. Defendant THHI maintains that the liability determinations upheld in *Hanlester* were based upon the finding that physicians' medical judgments were compromised by the express conditioning of payment on the referral of a patient. As evidenced above, however, the *Hanlester* court's determination was based upon the finding that Ms. Hitchcock's conduct "constitute[d] offers of payment to induce referrals." *Id.* The court simply did not base its determination upon the fact that any physician's medical judgment was compromised. Moreover, Defendant THHI's contention that proof of an express conditioning of payment

on the referral of a payment is required under the statute is inconsistent with the *Hanlester* court's conclusion that proof of an agreement is *not* required to establish an Anti-kickback statute violation.

In *Kats,* a medical services company collected blood and urine samples from medical offices and clinics and forwarded them to the defendant's company for laboratory work. *Kats,* 871 F.2d at 106-07. The defendant's company billed the medical services company, which billed the private insurance carrier or Medi-Cal and Medicare. *Id.* at 107. The defendant then kicked back half its receipts to the medical services company. *Id.* The scheme at issue in *Kats* does not suggest that any physician or care-giver's medical judgment was ever compromised. The physicians' decision to authorize the lab work was never even implicated as the kickbacks took place between the collection service and the laboratory.

In *United States v. Greber,* 760 F.2d 68 (3d Cir. 1985), the defendant physician operated a company that provided diagnostic services to physicians' offices. The defendant's company billed Medicare for the services, and after receiving payment, forwarded a portion to the referring physician as an "interpretation fee." 760 F.2d at 70. With respect to inducement, the jury was instructed that "even if the physician interpreting the test did so as a consultant to [the defendant's company], that fact [i]s immaterial if a purpose of the fee was to induce to ordering of services from [the company]." *Id.* at 71. On appeal of his conviction, the defendant argued that "absent a showing that the only purpose behind the fee was to improperly induce future services, compensating a physician for services actually rendered could not be a violation of the statute." *Id.* at 71. The Third Circuit rejected this argument, holding that if the payments were intended to induce physicians to use the defendant's services,

the statute was violated even if the payments were also intended to compensate for professional services. *Id.* at 72. Thus, the *Greber* decision confirms that the relevant inquiry with regard to inducement under the Anti-kickback statute is whether the payments were intended as an inducement for referrals and that the legitimacy of a service underlying a remuneration is immaterial when such intent is demonstrated.

Defendant THHI's citation to the Fifth Circuit's decision in *United States v. Miles,* 360 F.3d 472 (5th Cir. 2004) in support its contention that absent an intent to influence a physician's judgment in treating a patient there can be no violation of the Anti-kickback statute is equally unavailing. In *Miles,* the defendants operated a home health care business, *Id.* at 475. The defendants' business paid a public relations firm to distribute information regarding the business' home health services to area doctors. *Id.* at 479. When a physician determined that home health care services were needed for a patient, the physician's office might contact the public relations firm, which would in turn furnish the defendants' business with the patient's name and Medicare number for billing services, *Id.* The defendants' business paid the public relations firm $300 for each Medicare patient that became a client of the business as a result of the public relations firm's efforts. *Id.* Defendants were convicted under the Anti-kickback statute on the theory that the their business' payments to the public relations firm constituted improper kickbacks. *Id.* The Eighth Circuit reversed the convictions upon a finding that the payments to the public relations firm did not constitute illegal kickbacks within the meaning of the Anti-kickback statute. *Id.* at 481. The court concluded that the payments from the defendants' business were not made to the relevant decision maker - the physicians - as an inducement or kickback for sending patients to the defendants' business. *Id.* at 480-81.

Thus, the court's decision in *Miles* was based upon the lack of evidence that the defendants intended to influence a person making referral decisions, *i.e.*, the physicians. The *Miles* court did not hold that in order to violate the Anti-kickback statute, proof of an intent to influence a physician's medical judgment in treating a patient is required. Indeed, the court recognized that there are "situations where payments to non-doctors would fall within the scope of the statute," *id.* at 480, a proposition inconsistent with Defendant THHI's interpretation that *Miles* requires proof of intent to influence a physician's medical judgment in treating a patient to establish a violation of the Anti-kickback statute.

Based on the foregoing, the Court finds that Defendant THHI's claim that the Government is required to prove that Defendants acted with the intent to influence the medical judgment of a physician in order to establish an Anti-kickback statute violation is not supported by the plain language of the statute, nor any cited case authority. Instead, with respect to the inducement element of the offense, the Government was obligated to prove that Defendants offered or paid remuneration with the intent to gain influence over the reason or judgment of a person making referral decision.

The Court rejects that suggestion that a physician's referral decision necessarily implicates his or her medical judgment. It is certainly conceivable that a given patient could receive proper care at two different hospitals, yet a payment to a physician to refer the patient to one hospital over the other would clearly be prohibited under the statute. This type of referral decision would not necessarily result in the compromise of the physician's medical judgment since the patient would receive appropriate care at either hospital. As explained by Dr. Ver Hoeve, even though his decision regarding where to send patients was influenced by the

relocation agreements, he never considered his medical judgment to be compromised because both Alvarado Hospital and its competitor were accredited and patients were equally served at each. (Abascal Decl. Ex. 1 at 141; Ex. 13 at 154.)

The Court finds that even though the trial testimony established that no doctor compromised his or her medical judgment, the required element of proof was whether Defendants intended to gain influence over a physician's referral decision. Viewed in the light most favorable to the Government, the Court finds that the evidence adduced at trial is sufficient to establish this element.

The Government's proof demonstrated that a significant portion of the monies allotted under relocation agreements were paid to the host physicians, physicians who had established practices within the Alvarado Hospital service area and were thus in a position even superior to the relocated physician to make referral decisions. The evidence established that often host practices were targeted by Defendants to receive relocation agreements in order to increase hospital admissions. For example, Defendant Nazaryan, who was in charge of the Alvarado relocation program under Defendant Weinbaum's direct supervision, testified that the "primary goal of the relocation program at Alvarado Hospital" was "for physicians to utilize Alvarado Hospital for their admissions." (Gov't Resp. & Opp'n to Def. THHI's Mot., Ex. A, 1/11/05 at 50; 1/14/15 at 106.) Defendant Nazaryan testified about Government Exhibit 306, a document reflecting her fiscal year 1998 Goals and Objectives, *(id.,* Ex. B), which sets forth specific goals and accomplishments. The first goal on this exhibit reads:

> Grow Dr. Paul Ver Hoeve's practice and strengthen alliance with Alvarado Hospital Medical Center, Recruit Dr. Lodhi. Grow admissions by 24 per year.

Defendant Nazaryan testified that the manner in which Dr. Lodhi was recruited was through a relocation agreement. (*Id.*, Ex. A, 1/11/05 at 28.) Under "accomplishments," Government Exhibit 306 indicates "Drs. Ver Hoeve, Lodhi, Wolff practice grew by 99 admissions via alliance with AHMC." (*Id.*, Ex. B.) The next goal reflected on Government Exhibit 306 states:

> Recruit Dr. Gerster to AMC campus to Mid-City group to target Russian community and assist with transition of practice from Dr. Hendee. Grow admissions by 60 per year.

(*Id.*) Under the "accomplishment" column for this entry, Government Exhibit 306 indicates:

> Worked closely with Dr. Gerster regarding numerous practice interface issues, including relocation to the campus. Admissions grew by 211.

(*Id.*) Again, Defendant Nazaryan's testimony established that the term "recruit" meant providing a relocation agreement for Dr. Gertser. (*Id.*, Ex. A, 1/11/05 at 28-29.) The document continues with numerous other similar "goals" of recruiting physicians to grow admissions, and Defendant Nazaryan testified that each were accomplished through the use of relocation agreements. (*Id.* at 29-30.) At the end of the document is a handwritten notation indicating "100 percent goals met, Barry Weinbaum, 8/16/98." (*Id.*, Ex. B). Defendant Nazaryan acknowledged that Defendant Weinbaum did in fact make the notation. (*Id.*, Ex. A, 1/11/05 at 30-31.)

The Government presented additional testimony from Ms. Nazaryan along similar lines, and also introduced the testimony of Dr. Ver Hoeve, a host physician who received approximately $691,000 as a result of four Alvarado physician relocation agreements. (*Id.*, Ex. D., 12/17/04 at 26.) Indeed, Dr. Ver Hoeve testified that he decided to increase his referral of patients to Alvarado Hospital because the hospital recruited physicians to his practice, which gave him a good deal of money. (*Id.*, 12/8/04 at 7.) Dr. Ver Hoeve testified that the relocation agreements were provided after he was contacted by Defendant Weinbaum and asked to direct more of his patients to Alvarado Hospital. (*Id.*, Ex. D, 12/8/04 at 6; 12/9/04 at 6.) Dr. Ver Hoeve also testified that was asked by Defendant Nazaryan why he wasn't sending more patients to Alvarado. (*Id.*, Ex. D, 12/9/04 at 74-75.)

Given the testimony of Defendant Nazaryan and Dr. Ver Hoeve as well as various hospital business documents admitted as evidence, the Court finds that there is substantial evidence from which one could conclude that Defendants paid money to physicians with the intent to induce them to refer patients to the Hospital. Although Defendant THHI concedes that the Government has produced substantial evidence that Alvarado Hospital wanted physicians to admit patients to the Hospital, it maintains that an intent to grow admissions is insufficient to establish a violation of the statute. However, when viewed in the light most favorable to the Government, the evidence in this case went beyond a mere showing of intent to grow admissions and established that Defendants made substantial monetary payments to targeted physicians with the intent to grow admissions. Under these circumstances, the Court finds that a rational juror could conclude, beyond a reasonable doubt, that Defendants paid money to physicians with the intent to induce the physicians to refer patients to the Hospital. Accordingly, the evidence

was sufficient to establish the inducement element of an Anti-kickback statute violation.

B. Willfulness

Defendant THHI asserts that the Government has failed to establish sufficient evidence that Defendants acted with the specific intent to violate the Anti-kickback statute. In support of this assertion, Defendant THHI makes several arguments. First, Defendant THHI contends that violations of internal policies are insufficient to constitute a violation of the Anti-kickback statute. Second, Defendant THHI argues that Defendant Nazaryan's testimony is insufficient to avoid a Rule 29 motion. Third, Defendant THHI claims that no reasonable jury could find willfulness in light of unrebutted testimony and evidence regarding the reliance on advice of counsel. Finally, Defendant THHI contends that the Government cannot prove a knowing and willful violation through such a novel interpretation of the statute.

The Court disagrees with Defendant THHI's analysis and believes the Government has produced sufficient evidence to enable a reasonable juror to conclude that Defendants acted with the specific intent to violate the Anti-kickback statute. In *Hanlester,* the Ninth Circuit construed the scienter requirement in § 1320a-7b(b)(2) as requiring proof that a defendant (1) knows that the Anti-kickback statute prohibits offering or paying remuneration to induce referrals, and (2) engages in prohibited conduct with the specific intent to disobey the law. *Hanlester,* 51 F.3d at 1400.

The Government's proof in this case included portions of a Corporate Integrity Agreement ("CIA") executed between National Medical Enterprises, Inc. ("NME"), the predecessor

corporation to Tenet Healthcare Corporation[4] ("THC"), and the Department of Health and Human Services Office of the Inspector General as part of a Settlement Agreement between the United States and NME. The Court ruled that aspects of the CIA requiring NME to maintain certain legal compliance standards were admissible because they were necessary to place the Defendants' legal compliance efforts in the proper context. Under the CIA, NME/THC was required to "institute and maintain an information and education program designed to ensure that each employee is aware of applicable laws, regulations, and standards of business conduct that such employee is expected to follow and the consequences both to the employee and to the company that will ensue from any violation of such requirements." (Gov't Trial Ex. 52). Thus, evidence established that the Defendants were required to receive training regarding applicable health care laws such as the Anti-kickback statute.

Although Defendants contend that the Anti-kickback statute is unsettled and complex, its prohibition against offering or paying remunerations in order to induce the referral of program-related business is clearly set forth in the statute and has been in effect since 1977. *See Hanlester,* 51 F.3d 1390 ("Congress introduced the broad term "remuneration" in the 1977 amendment of the statute to clarify the types of financial arrangements and conduct to be classified as illegal under Medicare and Medicaid."). Moreover, the terms of the statute clearly proscribe a broad range of conduct. As Judge Lungstrum in *United States v. Anderson* noted, the statute is a meat axe, not a scalpel. *Anderson,* 85 F. Supp. 2d at 1075 n.25; *see also* THHI Reply

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[4] Tenet Healthcare Corporation is the parent corporation of Defendant THHI.

Brief at 10, citing 56 Fed. Reg. 35, 952 (July 29, 1991) ("Since the [Anti-kickback] statute on its face is so broad, concern has arisen among a number of health care providers that many relatively innocuous, or even beneficial, commercial arrangements are technically covered by the statute and are, therefore subject to criminal prosecution.").

Thus, the Court finds that the evidence in this case is sufficient to support the conclusion that the individual Defendants, both high-level hospital administrators with substantial training in health care legal compliance requirements, were aware of the prohibitions of the Anti-kickback statute and acted with the intent to violate the law. Indeed, Defendant Nazaryan acknowledged that she knew it would not be legal to pay money to a doctor to influence his judgment, (Abascal Reply Dec. Ex. B at 81), yet she testified that her intention in giving the amounts of money in Dr. Prince's relocation agreement was to "continue to hav[e] a working relationship with Dr. Ver Hoeve" and "for his patients' admissions." (Gov't Resp. & Opp'n to Def. THHI's Mot., Ex. A, 1/11/05, at 64.) With regard to Dr. Parsons, a relocated physician, Defendant Nazaryan testified that in putting together the relocation package, it was her belief that Dr. Michlin, the host physician, would be a beneficiary of the agreement, which she believed to be improper. (*Id.*, Ex. A., 1/12/05, at 28.) Likewise, Defendant Nazaryan testified that the overhead paid to Dr. Rao pursuant to a relocation agreement was "unnecessary at that time." (*Id.*, Ex. A., 1/12/05, at 35.)

In addition, Dr. Ver Hoeve testified that during a meeting, Defendant Weinbaum became upset when he discovered that Dr. Ver Hoeve's accountant had classified income received by Ver Hoeve through relocation agreements as "Alvarado income." (Trial Tr., Ver Hoeve, 12/10/04 at 53.) Dr. Ver

Hoeve testified that Defendant Weinbaum told him that Ver Hoeve could not list the income as Alvarado income and indicated that if there were an investigation of any type Weinbaum "more or less would be screwed." *Id.* Defendant Weinbaum also allegedly told Dr. Ver Hoeve that Alvarado Hospital "had problems like this before and [Ver Hoeve] needed to change it." *Id.*

Defendant THHI argues that Defendant Nazaryan's testimony is insufficient to establish specific intent because it was mixed with regard to her acknowledgment of culpability and because Defendant Nazaryan never specified which law she thought she had allegedly violated. Defendant THHI maintains that it is "clear" that Defendant Nazaryan could not have been referring to the Anti-kickback statute because she testified repeatedly that she never sought to influence any physician's medical judgment. However, as the Court has previously determined, the lack of intent to influence a physician's medical judgment is not necessarily synonymous with an intent to influence a physician's referral decision. As to the consistency of Defendant Nazaryan's testimony, her credibility was a matter appropriately left to the determination of the jury. As indicated above, when viewed in the light most favorable to the Government, her testimony was sufficient to support a conclusion that Defendants acted with the specific intent to violate the Anti-kickback statute.

Defendants contend that the Government's proof of willfulness is somehow lacking because there is substantial legal authority and evidence in the record establishing that relocation agreements have long been considered legal and appropriate in the health care industry as long as they are not contingent upon the admission of any patients to a hospital. However, there simply is no "belief of the health care industry" exception to liability set forth in the Anti-kickback

statute. In 1999, a safe harbor was enacted that excepted certain practitioner recruitment arrangements from being classified as a "remuneration" under the Anti-kickback statute. As can be seen by the following, the requirements of this safe harbor are extensive:

> (n) Practitioner recruitment. As used in section 1128B of the Act, "remuneration" does not include any payment or exchange of anything of value by an entity in order to induce a practitioner who has been practicing within his or her current specialty for less than one year to locate, or to induce any other practitioner to relocate, his or her primary place of practice into a HPSA for his or her specialty area, as defined in Departmental regulations, that is served by the entity, as long as all of the following nine standards are met--
>
> (1) The arrangement is set forth in a written agreement signed by the parties that specifies the benefits provided by the entity, the terms under which the benefits are to be provided, and the obligations of each party.
>
> (2) If a practitioner is leaving an established practice, at least 75 percent of the revenues of the new practice must be generated from new patients not previously seen by the practitioner at his or her former practice.
>
> (3) The benefits are provided by the entity for a period not in excess of 3 years, and the terms of the agreement are not renegotiated during this 3-year period in any substantial aspect; provided, however, that if the HPSA to which the practitioner was recruited ceases to be a HPSA during the term of the written agreement, the payments made under the written agreement will continue to satisfy this

paragraph for the duration of the written agreement (not to exceed 3 years).

(4) There is no requirement that the practitioner make referrals to, be in a position to make or influence referrals to, or otherwise generate business for the entity as a condition for receiving the benefits; provided, however, that for purposes of this paragraph, the entity may require as a condition for receiving benefits that the practitioner maintain staff privileges at the entity.

(5) The practitioner is not restricted from establishing staff privileges at, referring any service to, or otherwise generating any business for any other entity of his or her choosing.

(6) The amount or value of the benefits provided by the entity may not vary (or be adjusted or renegotiated) in any manner based on the volume or value of any expected referrals to or business otherwise generated for the entity by the practitioner for which payment may be made in whole or in part under Medicare, Medicaid or any other Federal health care programs.

(7) The practitioner agrees to treat patients receiving medical benefits or assistance under any Federal health care program in a nondiscriminatory manner.

(8) At least 75 percent of the revenues of the new practice must be generated from patients residing in a HPSA or a Medically Underserved Area (MUA) or who are part of a Medically Underserved Population (MUP), all as defined in paragraph (a) of this section.

(9) The payment or exchange of anything of value may not directly or indirectly benefit any person (other than the practitioner being recruited) or entity in a position to make or influence referrals to the

> entity providing the recruitment payments or benefits of items or services payable by a Federal health care program.

42 CFR § 1001.952(n).

Notably, Defendants have never contended that the relocation agreements at issue in this case fall within the terms of the regulatory safe harbor. Indeed, the safe harbor enacted in 1999 was not even in existence during much of the alleged conspiracy, which began in 1992.

Defendant THHI contends, however, that the existence of the safe harbor and the regulatory proposals which preceded it, preclude the Government from proving willfulness in this case because Defendants undertook efforts to predict the type of conduct that would ultimately prove to be permissible under the enacted safe harbor. However, Defendants' conduct must be governed by the law in existence at the time of their actions. *See Bay State*, 874 F.2d at 31 (noting that proposed changes to "remuneration" safe harbor did not govern prior conduct).

Moreover, there is no proof that the remunerations paid by Defendants in this case would have been protected even under the safe harbor provisions. The safe harbor excludes as "remuneration" any payment made "in order to induce a practitioner who has been practicing within his or her current specialty for less than one year to locate, or to induce any other practitioner to relocate, his or her primary place of practice." The safe harbor does not exclude payments made to physicians already practicing within the service area. To the contrary, the safe harbor explicitly provides that "payment or exchange of anything of value may not directly or indirectly benefit any person (other than the practitioner being

recruited) or entity in a position to make or influence referrals to the entity providing the recruitment payments or benefits of items or services payable by a Federal health care program." Here, the record is replete with evidence of payments made for the benefit of persons other than the recruited physician, the host physicians, who were in a position to make referrals to the Hospital.

For this reason, the Court must also reject Defendant THHI's contention that the Government's proof is compromised by its failure to offer evidence of the safe harbor provisions. There has simply been no evidence to establish that the safe harbor provisions are met, or that they ever could be met in this case. The Court does not dispute Defendant THHI's position that agreements that fall outside the safe harbor may nevertheless be legal and must be judged according to the elements of the Anti-kickback statute. This is precisely why the Court has spent the last four months conducting a jury trial as to these charges.

Although the Court concludes that the health care industry's belief as to the legality of relocation agreements is insufficient to absolve Defendants of responsibility under the Anti-kickback statute, the Court notes that it did allow Defendants substantial leeway in arguing their lack of intent based upon what it claimed to be recognized industry practice. The evidence did suggest that other hospitals use relocation agreements to bring physicians to their service areas, however this "industry evidence" did not rise to a level that would mandate the conclusion that Defendants lacked the intent to violate the Anti-kickback statute. In fact, the Government introduced evidence indicating that Defendants' use of relocation agreements was far more prolific than that of other area hospitals. During the time frame of the conspiracy alleged in this case, Defendants apparently entered 98

relocation agreements, while, during the same time frame, other San Diego County hospitals entered a total of only 1 to 3 relocation agreements per hospital. (Gov't Trial Ex. 676.)

Defendant THHI next contends that proof of specific intent was not established because the Government's proof of corporate policy violations may not be used to establish specific intent to violate the Anti-kickback statute. The Court concurs that an intent to violate internal corporate policy provisions may not be substituted for proof of specific intent to violate the Anti-kickback statute. However, as previously set forth, the Court finds that the Government's evidence provided sufficient proof of Defendants' specific intent, independent of the corporate policy violations. Although the Court believes that the Defendants' failure to comply with corporate requirements regarding relocation agreements may be interpreted as further evidence of an intent to violate the law, the corporate policy violations were not the only evidence of specific intent adduced by the Government.

Finally, the Court rejects Defendant THHI's contention that no reasonable jury could find willfulness in light of Defendants' reliance on the advice of counsel. Advice of counsel is not regarded as a separate and distinct defense but rather as a circumstance indicating good faith which the trier of fact is entitled to consider on the issue of specific intent. *United States v. Ibarra-Alcarez*, 830 F.2d 968, 973 (9th Cir. 1987). To qualify for an advice of counsel instruction, a defendant is required to show that there was full disclosure to his attorney of all material facts and that he relied in good faith on the specific course of conduct recommended by the attorney, *Id.*

In this case, the evidence was insufficient to conclusively establish that Defendants acted in good faith. Although the

evidence established that THHI's attorneys concluded that each relocation agreement at issue was legal, the evidence was insufficient to establish that Defendants made the requisite full disclosure of all material facts to the corporate attorneys. For example, Defendant Nazaryan testified that she did not disclose to corporate counsel that there was a lack of need for Dr. Parsons. (Gov't Resp. & Opp'n to Def. THHI's Mot., Ex. A, 1/12/05 at 28.) Similarly, Defendant Nazaryan testified that no disclosure was made to corporate counsel that there was not a need for Dr. Darush Moyhi at the time he was relocated. (*Id.*, at 45.)

Under these circumstances, the Court finds that a rational juror could conclude, beyond a reasonable doubt, that Defendants Weinbaum and Nazaryan made payments under the relocation agreements with knowledge that the Anti-kickback statute prohibits offering or paying remuneration to induce referrals and with the specific intent to disobey the law. The Court further finds the evidence sufficient to establish that in executing the relocation agreements, Defendants Weinbaum and Nazaryan acted within the scope of their employment. Accordingly, the Court finds the evidence sufficient to establish liability as to Defendants Alvarado and THHI. *See United States v. Hilton Hotels Corp.*, 467 F.2d 1000, 1004 (9th Cir. 1972) (recognizing that criminal liability may be imposed upon a business entity for acts or omissions of its agents within the scope of their employment).

* * *

Conclusion

Based upon the foregoing, the Court hereby orders as follows:

1. Defendant Weinbaum's Motion for Judgment of Acquittal is **DENIED**;

2. Defendant THHI's Motion for Judgment of Acquittal Under Rule 29 of the Rules of Criminal Procedure is **DENIED AS TO COUNTS 1 THROUGH 15 AND COUNTS 18 THROUGH 20**;

3. Defendant THHI's Motion for Judgment of Acquittal Under Rule 29 of the Rules of Criminal Procedure is **GRANTED AS TO COUNTS 16 AND 17**; and

4. Defendants Weinbaum, Alvarado, and THHI are **HEREBY ADJUDGED ACQUITTED OF COUNTS 16 AND 17 OF THE FOURTH SUPERSEDING INDICTMENT.**

IT IS SO ORDERED.

Dated: 3/3/05

/s/_____
M. JAMES LORENZ
UNITED STATES DISTRICT JUDGE